LAW OF THE SEA NEGOTIATIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON ARMS CONTROL, OCEANS, INTERNATIONAL OPERATIONS, AND ENVIRONMENT

OF THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

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LAW OF THE SEA NEGOTIATIONS

WEDNESDAY, SEPTEMBER 15, 1982

UNITED STATES SENATE,
SUBCOMMITTEE ON ARMS CONTROL, OCEANS,
INTERNATIONAL OPERATIONS AND ENVIRONMENT OF THE
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:09 a.m., in room 4221, Dirksen Senate Office Building, Hon. Larry Pressler (chairman of the subcommittee) presiding.

Present: Senators Pressler and Pell.

Also present: Senator Warner.

Senator PRESSLER. I want to begin this hearing, and I want to thank the witnesses for appearing. I should go over and greet you personally, but to expedite the hearing I will sit here and read my opening statement, or portions of it. For purposes of brevity, I will just read sections of it.

This morning the Subcommittee on Arms Control, Oceans, International Operations and Environment of the Committee on Foreign Relations will continue its ongoing series of oversight hearings on the Law of the Sea [LOS] negotiations. Those negotiations concluded on April 30 of this year at the 11th session of the Law of the Sea Conference in New York.

At that time, the Conference voted 130 to 4, with 17 abstentions, to approve the treaty text negotiated over the previous 8 years. The United States was among those countries voting against the treaty.

On July 9 President Reagan announced the decision not to sign the Law of the Sea Convention as concluded in New York and to limit U.S. participation only to the technical level. The subcommittee will want to explore with the witnesses this morning the reasons for that decision and its implications for U.S. national interests.

More recently, on September 2 the United States signed an agreement with the governments of France, West Germany, and the United Kingdom, providing for the resolution of conflicting claims. We want to discuss the nature and significance of this step as well.

I believe Senator Pell will have an opening statement later, but I will go forward with the hearing.

I want to thank our witnesses. I think it is appropriate that we get an update at this time as to where we stand and as to what will occur next.

Let me say that we will be placing a summary of this hearing in the record and distributing it to members of the Senate for purposes of their review.

Our first witness is the Honorable Theodore Kronmiller, Deputy Secretary of State for Oceans and Fisheries Affairs. Mr. Kronmiller, why don't you proceed with your prepared statement?

STATEMENT OF HON. THEODORE KRONMILLER, DEPUTY ASSISTANT SECRETARY OF STATE FOR OCEANS AND FISHERIES AFFAIRS, ACCOMPANIED BY BRIAN HOYLE, SPECIAL ASSISTANT TO THE ASSISTANT SECRETARY OF STATE FOR OCEANS, ENVIRONMENT AND SCIENTIFIC AFFAIRS AND DEPUTY DIRECTOR, OFFICE OF OCEANS LAW AND POLICY

Mr. KRONMILLER. Thank you, Mr. Chairman.

At the outset, I would like to note for the record that I am accompanied by Mr. Brian Hoyle, Deputy Director of the Office of Oceans Law and Policy and Special Assistant to the Assistant Secretary for OES at the State Department.

Mr. Chairman, I am pleased to respond to your request for a summary of the efforts to achieve the objectives of the President at the Law of the Sea Conference. I would also like to take this opportunity to discuss briefly the development of our national oceans policy, a matter concerning which you have expressed interest. I will also be prepared to discuss the Interim Seabed Agreement to which you made reference in your opening statement.

On January 29, the President announced that the United States would return to the Law of the Sea negotiations to work with other countries toward the conclusion of an acceptable treaty. The President set forth the limited objectives of the United States and emphasized his commitment to the multilateral process for reaching an agreement that would meet them. His position was based on the assessment that there was a reasonable possibility of achieving success, particularly because our objectives for amending the treaty related solely to deep seabed mining.

I note that these were consistent with congressional intent, as evidenced in title II of the Deep Seabed Hard Mineral Resources Act, which was favorably reported by all nine committees of jurisdiction, including this one. I also note that important statements on the floor of the Senate at the time of the vote on this legislation were exceedingly critical of the Law of the Sea text and represented concerns to which the President's objectives responded.

In accordance with Presidential instructions and in light of congressional sentiment, the U.S. delegation to the final Conference session worked to find practical solutions to the problems presented by the Draft Convention. Our negotiating goals were confined to those essential to protecting vital national interests and our presentation of specific proposals demonstrated flexibility often and in a wide variety of ways. Indeed, midway through the Conference session our delegation sought and received significant changes to its instructions in order to try to break a serious deadlock.

The United States was supported by many of its allies. Others sought to encourage a compromise from what they regarded to be a position of relative neutrality. In particular, the "Group of 11"—

Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden, and Switzerland—prepared a package of amendments as a possible basis for negotiations between the United States and the Group of 77.

In our view, the approach offered by the Group of 11, represented a useful point of departure for addressing some, but not all, of our concerns. The Group of 77 insisted, however, that the United States and its allies accept the proposals as an exhaustive negotiating agenda. Naturally, we were unable to accede.

Despite our efforts and those of other delegations, meaningful negotiations never took place on amendments suggested by the Group of 11, sought by the United States or offered jointly by the United States, Belgium, Federal Republic of Germany, Italy, United Kingdom, France, and Japan. Under those circumstances, it proved impossible to achieve any of the President's objectives.

On April 30, the Conference adopted the treaty text by a vote of 130 in favor, 4 against, with 17 abstentions. Those that voted against adoption were the United States, Israel, Turkey, and Venezuela. Those that abstained were the United Kingdom, Federal Republic of Germany, Belgium, Netherlands, Luxembourg, Italy, Spain, Thailand, and the Soviet bloc—except Romania.

The reasons which prompted 21 countries to abstain, or to vote against the treaty, were varied. However, the number and economic importance of states that expressed reservations or dissatisfaction must be regarded as significant. Moreover, only a few among those nations having companies in the pioneer deep seabed mining consortia voted in favor of adoption of the text.

Because the seabed mining provisions led the President to decide against signature of the treaty, I would like to describe them in some detail. The proposed regime would preclude private investment in deep seabed mineral production and would adversely affect important U.S. economic and political interests.

Discretionary powers of the International Seabed Authority would render highly uncertain the granting of mining contracts and the continuity of mining operations.

Mandatory technology transfer requirements would violate proprietary rights of technology holders and suppliers and cast grave doubt on the ability of miners to utilize vital technology owned by third parties. There are also implications for our national security.

Revenue-sharing obligations imposed on mining operators would be exceedingly burdensome—$527 million to $1.3 billion per project, according to U.N. estimates.

Artificial limits on seabed mineral development, both overall and with respect to each mining operation and interested State party, would permit arbitrary decisions by the Authority in allocating available quotas.

Extensive privileges for the Enterprise, the seabed mining arm of the International Seabed Authority, would by themselves make it extremely difficult, perhaps impossible, for private ventures to compete without national subsidies or other inducements.

The discriminatory advantages enjoyed by the Enterprise would include: the right of access for an extended period to the best technology available; the right to long-term, interest-free loans and loan guarantees from states parties for the first, fully integrated

mining operation—costing $1.5 billion, of which the U.S. share would be $375 million; the right to the better of two prospected minesites submitted by every private or State applicant; the right to funds from States parties for initial administrative expenses; the right to an initial production quota and a priority over competitors for subsequent quotas, if the Enterprise has fewer sites than have all private and State applicants together; exemption from revenue sharing for up to 10 years after the commencement of commercial recovery of minerals; exemption from antimonopoly and antidensity restrictions; exemption from monetary penalties and suspension or termination of mining activities; and probable exemption from national taxation.

The resolution on preparatory investment protection for pioneer miners, which was finally negotiated at the last session, fails to correct the fatal flaws of the Draft Convention and gives rise to additional difficulties. The resolution would cause further investment uncertainty and establish obligations beyond those provided by the treaty. The following are major problems:

The resolution would allow the U.S.S.R., developing countries, and others to achieve pioneer investor status, despite the fact that their seabed mining activities to date have been extremely limited or nonexistent, and would thereby stimulate conflicting claims to minesites of bona fide pioneers.

The transfer of technology would be mandatory and the training of personnel designated by the Preparatory Commission would be required without compensation, even prior to entry into force of the treaty.

Financial obligations would include a $250,000 fee for registration with the Preparatory Commission; a $250,000 fee for processing a plan of work; accrual of a $1-million annual fee—payable upon approval of a contract by the Authority; and expenditures to meet diligence requirements set by the Commission.

Reservation of minesites by pioneers for the Enterprise would entail, at the request of the Commission, not only unreimbursed prospecting—at a cost of $16 to $20 million per site—but also exploration, which would be far more expensive and would be reimbursed only later and at an artificially low rate of interest.

Even for miners granted recognition by the Commission, there would be no guarantee that the Authority would approve contract applications or grant full production quotas.

The American Mining Congress has stated that ocean mining by U.S. companies could not and would not take place under the LOS regime. As a free market economy, the United States depends upon private enterprise for the production and supply of minerals to fuel our highly industrialized economy and to protect our economic security.

Unfortunately, the United States also relies upon imports for many of these critical materials. Unless mining were to proceed outside the treaty, the Enterprise could achieve a monopoly on seabed mineral production, a result that would be distinctly contrary to our national interest. Dependence by the United States and its key allies upon uncertain foreign sources of strategic minerals, including cobalt and manganese found in deep seabed nodules, would present a permanent threat to the security of the West. We

cannot manufacture jet engines without cobalt, nor produce steel without manganese.

The treaty presents other serious difficulties. The decisionmaking systems of the Authority and the Preparatory Commission would be so structured that the United States and other potential deep seabed mineral producers and consumers would have inadequate protection against injurious policy and operational decisions.

The industrialized West would provide the greatest share of funding and all the technology, but the developing countries would have disproportionate and frequently decisive influence in the organization. The U.S. annual contribution to the Authority's administration budget would be at least $5 to $10 million at the outset. The startup cost for the Authority remains to be reliably determined.

However, the treaty text does not assure the United States a seat on the 36-member executive Council of the Authority, although the Soviet bloc is guaranteed at least 3 seats and the developing countries could expect approximately 28. Even if on the Council, the United States and its allies could not block many sorts of adverse decisions relating to access and budgetary matters, among many others, nor assure affirmative action of any kind.

In the plenary, supreme, Assembly, the United States would be represented, but would have voting influence no greater than that of any other State party, no matter how insignificant economically and politically. In the Preparatory Commission, the United States would not have a vote unless it signed the treaty. Even with a vote, the United States could not expect to protect its interest, given the decisionmaking procedures and the likely composition of the Commission.

The treaty expressly provides that so-called national liberation groups can be granted financial and other economic benefits from seabed mining and Continental Shelf development beyond 200 miles. This is highly objectionable in principle. Moreover, without an assured Council seat, we could not be certain of the ability to block the sharing of benefits with such organizations. Even if the United States had a seat and blocked the provision of benefits, as it might have to do, it would invite retaliatory action by other states.

The LOS seabed mining regime, though very bad, could become worse. The treaty provides for a review conference 15 years after the commencement of commercial seabed mining. Following 5 years of negotiations, the Conference could adopt amendments that could automatically enter into force for all parties, upon a vote of three-fourths and ratification by two-thirds. Thus, there could be massive amendments of the seabed part of the text, over United States objection and without Senate advice and consent. Access under the treaty by the enterprises of Western industrialized States could be legally terminated outright, precisely when ocean minerals became an important, perhaps essential, alternative to dwindling and unreliable land-based supplies. Our only recourse would be denunciation of the Convention—an impractical course of action.

Administration policy on the Law of the Sea has been the target of curious criticism. It has been suggested that we have sacrificed

real, material interests in deep seabed mineral development in the pursuit of ideological purity. This misrepresents the aims and actions of the administration. As I have pointed out, the seabed regime is objectionable not only for reasons of principle. The treaty gives rise to genuine, practical, economic, and political problems. This fact is clearly evidenced by widespread U.S. industry support of the President's decision and by a recent letter to him signed by 30 Senators.

It was, in fact, the Group of 77 that, from beginning to end, took an ideological approach to the seabed negotiations and sought to tie them to the North-South "dialog." The fundamental goal of the Group of 77 was at the outset of the Conference, and remains today, the promotion of a new international economic order by which the developing nations would gain the power to compel the transfer of technological and financial resources from the developed to the developing countries on concessionary and even expropriatory terms.

In this relation, I would like to offer for the record pertinent statements by representatives of the Group of 77 and its member states.

[The information referred to follows:]

NEIO STATEMENTS BY THE GROUP OF 77

PAUL ENGO (CAMEROON), CHAIRMAN OF COMMITTEE 1 OF THE CONFERENCE (SEABEDS ISSUES), 1975 SESSION, REPORT ON THE WORK OF THE COMMITTEE AT THE 5TH SESSION

* * * of considerable importance for me was another international document commanding wide universal (sic) support: "The Declaration on the Establishment of a New International Economic Order" adopted by the General Assembly on 1 May 1974 at its sixth special session. I could do this because I had a free hand.

WAPENYI (UGANDA), CHAIRMAN OF THE GROUP OF 77—1980 SESSION (NEW YORK)

The Group (of 77) realized that, when the needs of the majority of developing countries were expressed to the industrialized and more developed countries, dialogue tends to become both protracted and also entangled in the question of a new and more balanced economic order. The Group had therefore tried to include in the preambular clauses the idea that such an order would be incorporated in the Convention, and it would continue the negotiations in Geneva with that concern in mind.

The proposals regarding the common heritage principle were in keeping with the preamble of the convention and with the effort to establish a new international economic order.

PAUL ENGO, 1978 SESSION (GENEVA)

We cannot have a viable convention if many nations participating at this Conference must find at the end that they have gained nothing from it. This is particularly so with regard to the poor young nations who obtained self-determination after generations of subjugation, and must struggle to survive in a cruel and complicated world. In my considered opinion, we are not here merely to write a business arrangement to facilitate exploitation of the sea-bed resources by the industrially rich and powerful nations. We are here to design a new relationship among States and between them and the International Sea-Bed Authority we seek to establish to ensure that the declared common heritage benefits all mankind.

GUATEMALA—1980 SESSION (NEW YORK)

The spokesman for Guatemala said that his delegation was pleased with the progress of the negotiations and that, "It had thus been possible to achieve the consensus essential for developing and putting into effect the new international law of the

sea, which would unquestionably be a pillar of the new international economic order.

TANZANIA—1974 SESSION, PLENARY MEETING

In order to develop a modern international law, it was inevitable that certain concepts and dogmas would be challenged, particularly that of the freedom of the sea, which was completely inappropriate in the modern world. Freedom of the seas has ceased to serve the interests of international justice. It had become a catchword and an excuse for a few countries to exploit ruthlessly the resources of the sea, to terrorize the world and to destroy the marine environment. That type of freedom belonged to the old order and had outlived its time.

PAKISTAN—1974 SESSION, PLENARY

He reminded the Committee of the important decision taken by the General Assembly at its sixth special session in the Declaration on the Establishment of a New International Economic Order (Resolution 3201 (S-VI)) on which the new international economic order was to be based. The General Assembly had recognized that the prosperity of the international community as a whole depended on that of its constituent parts, that the interests of the developed countries could no longer be isolated from those of the developing countries and that there was a close interrelationship between the prosperity of the former and the development of the latter. * * * It was in this spirit that this delegation approached the concept of the common heritage of mankind.

SATYA NANDAN, FIJI, CHAIRMAN OF THE GROUP OF 77, 1979 SESSION

* * * activities regarding the exploration and exploitation of the resources of the deep seabed and other related activities can only be carried out legally if governed by the international regime to be established by an international treaty of a universal character generally agreed upon * * * The enactment of such legislation will undoubtedly poison the atmosphere of the negotiations, and would most probably lead to a breakdown of the Conference * * * endangers the future of the entire system of multilateral negotiations under the auspices of the United Nations * * * [and] is yet another example of the insensitivity of those [legislating] States to the ever-widening economic gap between the developing and developed world and the legitimate demands of the developing countries for an equitable share of the wealth of this planet.

ZAMBIA—1980 SESSION (NEW YORK)

The inclusion of a common heritage fund in the new convention on the law of the sea would have a tremendous impact on the establishment of a new international economic order.

JAMAICA—1974 SESSION, PLENARY

The common heritage would serve as a catalyst in the creation of a new order of international social justice.

PAUL ENGO (CAMEROON), CHAIRMAN OF THE COMMITTEE 1 OF THE CONFERENCE (SEABEDS ISSUES)—1974 SESSION, PLENARY

A major choice faced the present generation; it had to choose between exploitation by the new International Authority, on the one hand, and the de facto monopoly of a few technologically developed countries under a licensing system, on the other. * * *

It was no longer possible to tolerate a world dominated by a privileged few to the detriment of all the others but, on the other hand, there was nothing in contemporary trends which justified the conclusion that the young developing nations merely wished to bring down those privileged few and establish a new dictatorship of their own.

TANZANIA—1974 SESSION, PLENARY

The Conference could create either a machinery which would represent and promote the interests of mankind as a whole or one that would perpetuate, if not intensify, the oppression of the vast majority of the world community, by a few technologically advanced countries.

The International Authority should be a democratic body responsible for bridging the gap between the rich countries and the poor countries and establishing a fairer and more just system of international relations.

Mr. KRONMILLER. It has also been suggested that we have thrown the baby out with the bath water—that is, that we will not be able to exercise the navigation and overflight rights and freedoms recognized by the Conference without taking on the obligations of its deep seabed mining provisions. This is a distorted view of the rights of the United States under international law.

The exercise by the United States of rights and freedoms under international law can be limited only with our consent. This point holds true with regard both to our right to mine the seabed and to our right to navigate under, on and over the world's oceans, including international straits. We have those rights today, we are proceeding with their exercise, and we intend to maintain them.

I note that, although we found an acceptable seabed regime to be unachievable, we were successful in working with others to insure that no adverse changes were made to navigation and overflight provisions. Portions of the treaty dealing with these and many other nonseabed issues, while not optimal, are consistent with the objectives of the United States and well serve the interests of the international community.

Two stages of the LOS Conference remain. Drafting changes are supposed to be adopted by an informal plenary on September 22 to 24. The final act is to be opened for signature in December and interpretive statements are to be presented at that time. The United States will participate in these remaining Conference processes at a technical level and will be concerned with those treaty provisions that serve our interests.

We will not participate in the Preparatory Commission, because the treaty is fatally flawed and the Commission lacks the authority to change the text. Any rules and regulations established by the Commission must, of course, be consistent with the treaty.

Outside the Conference process, we will continue to consult with other countries, as bilateral and multilateral cooperation will be an essential element of our policy. Already, the United States, United Kingdom, Federal Republic of Germany, and France, as you have noted have formally agreed on a mechanism for encouraging pioneers to resolve overlaps among their license applications and for consultation among the parties prior to the issuance of licenses or the establishment of reciprocal recognition of minesites. Clearly, signature of this agreement by key allies concerned with deep ocean mining demonstrates that the United States is able to continue to cooperate with other nations in the protection and advancement of important interests.

We will continue to pursue measures calculated to insure that ocean mining proceeds under U.S. licenses and permits. The American Mining Congress has stated that "a satisfactory investment climate can be created and the basic conditions met by building on the existing U.S. Public Law 96-283, the Deep Seabed Hard Mineral Resources Act." The United States currently holds and is proc-

essing applications for 10 of the 11 minesites for which licenses are being sought by the pioneer consortia.

Consequently, we are in a very favorable position, even though there are a few duplicate and conflicting applications filed with other countries. Indeed, resolution procedures agreed among all five consortia are already being implemented. In light of these facts, it is difficult to credit allegations to the effect that seabed mining activities will take place only under foreign flags and within the compass of the LOS treaty.

The administration will continue with the development of a national oceans policy. The basis for the protection of our navigation and overflight rights has already been established. Fisheries policies provided by our domestic law are being vigorously implemented. In addition, we are rapidly proceeding with the establishment of a firmer basis on which to facilitate marine scientific research. Our other ocean interests are under review.

We will continue to work closely with this committee and with other committees in the Congress that are concerned with the Law of the Sea and oceans policy.

At this time I would be pleased to answer any questions. Thank you.

Senator PRESSLER. Thank you very much.

You talk of the interpretation under international law. I know you are very familiar with this area. I spend 2½ years in the Legal Advisor's Office at the State Department when I was much younger and I know there are endless disputes and debates about the body of the thing we call international law, the practices and the unwritten agreements of nations.

You say the exercise by the United States of rights and freedoms under international law can be limited only with our consent. I think a lot of the discussions about the need for the Law of the Sea, about our national defense, rights of passage, and so forth, have sprung from misunderstandings or different interpretations of what would happen under so-called international law.

So I might ask you to expand a little on the following. Would our rights be recognized under international law? Of course, that is what nation's voluntarily abide by, as I understand it. We can go into the International Court of Justice and get a decision, but there is no way to enforce it, so it is not law in the same sense as domestic law.

Nevertheless, it is usually adhered to by nations engaged in commerce. But if most nations of the world sign this Law of the Sea Treaty, isn't it possible that we will find ourselves in great difficulty in some areas?

Mr. KRONMILLER. Senator, we have given very careful consideration to this issue and we are firmly of the view that the rights and freedoms specifically relating to navigation and overflight, as well as relating to other areas, exist independently of this Convention. This is to say that they are simply reflected in the Convention and that our ability to exercise those rights and freedoms in the future is not at all dependent upon our becoming party to the Convention.

I am aware that there has been speculation to the effect that the United States might encounter some difficulties in exercising its rights if it does not become a treaty party, insofar as some parties

may decide to create problems for us. It is our view that such difficulties would be created as a result of political motivations—that they would be purely political in character and that they would not affect our legal rights.

We would, of course, take whatever measures are required lawfully and permitted lawfully to assert and preserve our rights as they exist under international law.

Senator PRESSLER. I understand that Ambassador Richardson, former head of the LOS delegation, maintains that were the United States not a party to the treaty, would most certainly face legal challenges to navigation and seabed mining rights. How do you respond to that?

Mr. KRONMILLER. Senator, I find that a somewhat remarkable charge.

Ambassador Richardson has stated unequivocally on many, many occasions in his capacity as representative of the United States at the Law of the Sea Conference and in his capacity as representative for the former administration before the Congress that these navigation rights exist independently of the treaty.

There are a number of quotes which I could offer you, but I think two will do for the time being. At a press conference, in response to a question on March 16, 1978, Ambassador Richardson stated:

> On the other hand, in the absence of a comprehensive agreement, these are, nevertheless, rights that we would insist on maintaining.

Indicating by the maintenance of these rights that they do exist independently of the convention.

Furthermore, he stated in Cincinnati on January 18, 1978, that:

> Provisions have been negotiated which safeguard traditional high seas freedom within the 200-mile economic zone, except for specific resource-related rights accorded coastal states by the Convention.

Here, the reference to the traditional character of these legal rights.

I can offer these and other quotes for the record, if you like.

[The information referred to follows:]

STATEMENTS OF HON. ELLIOT RICHARDSON ON NAVIGATION RIGHTS

EXCERPT FROM ADDRESS BY AMBASSADOR ELLIOT L. RICHARDSON AT THE SEAPOWER SYMPOSIUM OF THE CINCINNATI COUNCIL OF THE NAVY LEAGUE OF THE UNITED STATES, CINCINNATI, OHIO, JANUARY 18, 1978

This conference, unique in diplomatic history, is entering its fifth year. Although some observers have disparaged it as a tedious talkathon, the Conference has in fact made remarkable progress on a vast range of issues of vital importance to the United States and the world community. Provisions have been negotiated which safeguard traditional high seas freedoms within the 200-mile economic zone except for specific resource-related rights accorded coastal states by the Convention. . . .

EXCERPT OF AMBASSADOR ELLIOT RICHARDSON AT PRESS CONFERENCE, MARCH 16, 1978

Our concern, though, is not with the prospect of conflict arising out of seabed mining; our concern rather, insofar as conflict is concerned, is primarily with navigational interests. Of course, this is a reason, as the statement points out, why it would be highly desirable to be able to achieve comprehensive agreement on transit passage through straits, freedom of navigation and overflight in the Exclusive Economic Zone, sea lanes through archipelagos, and so on. On the other hand, in the absence of comprehensive agreement, these are, nevertheless, rights that we would

insist on maintaining. It is important therefore that we look at the measures that would be necessary to maintain them should the Conference fail. . . .

EXCERPT FROM TESTIMONY OF AMBASSADOR ELLIOT RICHARDSON BEFORE THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION AND THE SUBCOMMITTEE ON PUBLIC LANDS AND RESOURCES OF THE COMMITTEE ON ENERGY AND NATURAL RESOURCES, OCTOBER 4, 1977

In this respect, new provisions were negotiated and incorporated into the ICNT regarding the proposed 200-mile exclusive economic zone (EEZ) which appear to safeguard traditional high seas freedoms within the EEZ except for specific resource-related rights accorded coastal states. Similarly, we were able to maintain broadly supported articles on transit through, over and under straits over the diminishing opposition of a small number of States. . . .

EXCERPT FROM REMARKS BY AMBASSADOR ELLIOT L. RICHARDSON TO THE WASHINGTON PRESS CLUB, MARCH 14, 1979

We, as well as the Soviet Union, have adhered unequivocally to the position that our commercial and military vessels and aircraft have the right to traverse on, over, and under international straits, and the waters beyond the territorial sea. Formal affirmation of this right was a priority second to none. The world community, through the Conference, has accorded us that recognition.

EXCERPT FROM PRESS CONFERENCE GIVEN BY AMBASSADOR ELLIOT L. RICHARDSON, MARCH 16, 1978

. . . There would probably be some international protest against the legal position taken by the United States. That position is that the conduct of deep seabed mining is right under international law applicable to the high seas, that it can be carried out consistently with the concept of a common heritage of mankind in the event of the failure of the Conference to arrive at an international system of exploitation.

To put it the other way around, it would be a distortion of the concept of the common heritage for it to have the effect indefinitely of preventing seabed mining from going forward. There will undoubtedly be some protest against that position. We think it is a legally valid position and that it would prevail if challenged.

EXCERPT FROM TESTIMONY OF AMBASSADOR ELLIOT L. RICHARDSON BEFORE THE SUBCOMMITTEE ON ARMS CONTROL, OCEANS, INTERNATIONAL OPERATIONS AND ENVIRONMENT OF THE COMMITTEE ON FOREIGN RELATIONS, MARCH 17, 1978

First, the United States maintains that the right to engage in seabed mining is a legal freedom of the high seas, and other nations should recognize that we cannot and will not let the exercise of this right by our citizens be interminably delayed.

MAY 12, 1977—HOUSE INTERIOR AND INSULAR AFFAIRS COMMITTEE

The United States, as you know, has a number of objectives at the LOS Conference. Among these, we seek to: * * * preserve high seas freedoms, including navigation and similar uses in the 200-mile Economic Zone; * * *

APRIL 27, 1977—HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE, OCEANOGRAPHY SUBCOMMITTEE

Mr. Chairman, the United States seeks a number of important objectives at the LOS Conference. We seek to: * * * preserve high seas freedom, including navigation and similar uses in the 200-mile Economic Zone; * * *

MAY 17, 1977—HOUSE INTERNATIONAL RELATIONS COMMITTEE, SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS

We also have other important law of the sea objectives. We seek to: * * * preserve high seas freedom, including navigation and other uses of the seas, both globally and in the 200-mile Economic Zone; * * *

JULY 14, 1979—REMARKS AT THE LAUNCHING OF THE USS SAMUEL E. MORISON (FFG 13), BATH, MAINE

It is not enough merely to insist that freedom of navigation and overflight beyond a narrow territorial sea and unimpeded transit through, under, and over straits are essential. Nor is it enough to be prepared to assert our rights in the face of challenge. Our strategic objectives cannot be achieved unless the legitimacy of these principles is sufficiently accepted by the world at large that their observance can be carried out on a routine operational basis.

AUGUST 23, 1979—STATEMENT IN PLENARY SESSION AT THE LAW OF THE SEA CONFERENCE, NEW YORK

It is both surprising and distressing that distorted press reports should have caused such a stir at the Law of the Sea Conference, where the views of the United States with respect to navigation and overflight have long been well known to all participants. Press reports notwithstanding, those views have not changed. Activities in the oceans by the United States are fully in keeping with its longstanding policy and with international law, which recognizes that rights which are not consistently maintained will ultimately be lost.

Mr. KRONMILLER. On seabed mining, Ambassador Richardson also made a number of statements. At a press conference he made reference to our legal position, that deep seabed mining is a freedom of the high seas and stated we think it is a legally valid position and that it would prevail if challenged.

Before the House Foreign Affairs Committee on January 23, 1978, he stated that among the principal elements of the administration's position are that seabed mining legislation then under consideration "should proceed on a legal basis that notwithstanding future agreement on an international regulatory regime, deep seabed mining is a freedom of the high seas."

Again, there are numerous quotes and we can provide those for the record.

[The material referred to follows:]

EXCEPTED STATEMENTS OF HON. ELLIOT RICHARDSON ON DEEP SEABED MINING

APRIL 27, 1977—HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE; OCEANOGRAPHY SUBCOMMITTEE

Many of these elements are present in H.R. 3350. * * * implicitly, it reaffirms our legal position that mining the deep seabeds beyond the limits of national jurisdiction is a high seas freedom; * * * The alternative favored by the Administration would be to reaffirm that U.S. miners now have the right to mine the deep seabed under high seas principles and therefore reaffirm our intention to seek provisions in the treaty which will ensure that the integrity of prior investment in commercial mining operations will be protected. * * *

MAY 17, 1977—HOUSE INTERNATIONAL RELATIONS COMMITTEE; SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS

I would like, therefore, to offer my preliminary views on the provisions which we believe should be included in any deep seabed mining legislation.

We believe any legislation should: Reaffirm the U.S. legal position that mining the deep seabed beyond the limits of national jurisdiction is an existing high seas freedom; * * * provide for harmonizing U.S. requirements with those of other nations that enact similar legislation.

OCTOBER 4, 1977—COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION; SUBCOMMITTEE ON PUBLIC LANDS AND RESOURCES, COMMITTEE ON ENERGY AND NATURAL RESOURCES

S. 2085 does this as well but is also in our view deficient in that it describes deep seabed mining as being a high seas freedom but only until agreement on a treaty. Provisions that can be characterized as site-specific could be perceived to undercut

our claim that we are proceeding to mine on the basis of high seas rights. These rights do not permit the extension of sovereignty or exclusive jurisdiction to the high seas. The Administration urges that the provisions in question be reshaped to be consistent with the unequivocal statement in S. 2053 that "commercial recovery of hard mineral resources from the deep seabed is a freedom of the high seas."

JANUARY 18, 1978—SEAPOWER SYMPOSIUM OF THE CINCINNATI COUNCIL OF THE NAVY LEAGUE OF THE UNITED STATES, CINCINNATI, OHIO

Rather than accept outcomes which we consider wrong for the United States and, we believe, would be wrong for the world community as well, we would reluctantly choose to forego a treaty. The United States does not need a comprehensive treaty more than other nations. Seabed mining can and will go forward with or without such a treaty. We have the means at our disposal to protect our oceans interests if the Conference should fail, and we shall protect those interests if a comprehensive treaty eludes us. * * *

JANUARY 23, 1978—HOUSE INTERNATIONAL RELATIONS COMMITTEE; SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS AND SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY AND TRADE

Among the principal elements of the Administration's position are that the legislation: Should proceed on the legal basis that, notwithstanding future agreement on an international regulatory regime, deep seabed mining is a freedom of the high seas; * * *

MARCH 16, 1978—PRESS CONFERENCE

There would probably be some international protest against the legal position taken by the United States. That position is that the conduct of deep seabed mining is a right under international law applicable to the high seas, that it can be carried out consistently with the concept of a common heritage of mankind in the event of the failure of the Conference to arrive at an international system of exploitation.

To put it the other way around, it would be a distortion of the concept of the common heritage for it to have the effect indefinitely of preventing seabed mining from going forward. There will undoubtedly be some protest against that position. We think it is a legally valid position and that it would prevail if challenged.

AUGUST 17, 1978—SUBCOMMITTEE ON ARMS CONTROL, OCEANS AND INTERNATIONAL ENVIRONMENT OF THE SENATE FOREIGN RELATIONS COMMITTEE

First, the United States maintains that the right to engage in seabed mining is a legal freedom of the high seas, and other nations should recognize that we cannot and will not let the exercise of this right by our citizens be interminably delayed.

SEPTEMBER 15, 1978—LAW OF THE SEA CONFERENCE, PLENARY MEETING

Legal restraints may be imposed on national action beyond the limits of the jurisdiction of any state only by their inclusion in rules of international law. With respect to seabed mining we are unaware of any such restraints other than those that apply generally to the high seas and the exercise of high seas freedoms, including the prohibition on sovereignty claims, the exclusive jurisdiction of states over their ships and nationals, and the duty to have reasonable regard for other high seas users.

States will become subject to additional restraints when they adhere to a treaty that establishes an international authority to manage and oversee seabed mining. They will then have voluntarily accepted the alteration of those freedoms in the broader interest of creating a stable legal regime for the use and management of the world's oceans and their resources. But we cannot accept the suggestion that other States, without our consent, could deny or alter our rights under international law by resolutions, statements, and the like.

MARCH 4, 1979—REMARKS AT WASHINGTON PRESS CLUB

Nevertheless, it is clear that despite these assurances the Third World resents and opposes the legislation. Last summer, when passage of the bill appeared imminent, the Chairman of the Group of 77 told the Conference that unilateral action would be viewed by the Group as a grave breach of international law. He insisted

that the United Nations' "common heritage" resolution overrode any nation's high seas rights with regard to seabed mining.

My response to the Third World totally disagreed with this charge. I rejected any contention that other states, without our consent, could alter our high seas rights through manifestoes, resolutions and the like. We are convinced that nations retain their rights to mine the deep oceans as one of the freedoms of the seas. On this point there is flat and unbridgeable disagréement which will someday become a major dispute unless we can all agree on a new treaty regime that resolves it.

SEPTEMBER 24, 1980—STATEMENT BEFORE AMERICAN MINING CONGRESS, SAN FRANCISCO, CALIFORNIA

In addition to assessing the risks normal to investment in a hard-mineral mining venture on land, seabed mining investors have had to reckon with the absence of a generally accepted legal regime. Our view, as you know, is that deep seabed resources may be recovered lawfully by any state or its nationals as an exercise of a traditional high seas freedom. We see nodules as analogous to the living resources of high seas—the fish—that are found beyond the 200-mile fisheries zone. This is not merely a defensible position but one that rests on a solid foundation of established international law. There are, however, difficulties with it. One is that it is totally rejected by most governments, including those of all the developing countries. A second is that deep seabed nodules can't swim, and seabed miners aren't fishermen. Miners must have an exclusive legal right to a suitable ore body before they undertake the large long-term investments necessary to recover and process the ore. Commercially exploitable manganese nodules, with negligible exceptions, do not occur in parts of the seabed subject to the resource jurisdiction of any nation. No nation can confer a right to mine them which is enforceable against the nationals of any other country. Indeed, the position that mining is a high-seas freedom cannot be squared with the assertion of any such power.

In our view, however, nations can license their own nationals to mine the deep seabed and can reciprocally agree to respect the licenses granted by other nations. The United States and the Federal Republic of Germany, as you know, have each enacted legislation that would authorize such reciprocal licensing, not as an alternative to the Law of the Sea Convention but to foster the continued development of seabed mining capability. It is likely that several other advanced industrial countries will in due course follow suit. The number of these countries, however, is not likely in the foreseeable future to exceed six or eight. Can they collectively provide sufficient security for seabed mining investment? This in itself is a question of some difficulty. The fact that there have been threats of reprisal is not, of course, dispositive: we have no way of knowing whether or not such threats would in fact be carried out, or, if they were, what damage they might inflict. That there would be legal challenges to any claims purporting to rest on national legislation is certain; only the outcome is in doubt.

JULY 28, 1980—LAW OF THE SEA CONFERENCE, PLENARY MEETING

I do not regard it useful to debate again the legality of deep seabed mining under international law. I have stated the position of the United States several times over the past 2½ years: namely, that seabed mining beyond areas of recognized national jurisdiction remains a freedom of the high seas until and unless circumscribed by an international agreement in force. I refer all colleagues to earlier statements for the detailed arguments. As their delegations have already made clear, a number of other countries whose nationals are presently engaged in developing deep seabed mining technology share this legal position.

Senator PRESSLER. What are the chances of negotiating a so-called mini-treaty alternative on seabed mining among reciprocating states? Even if we do persuade countries like Great Britain and West Germany to join us in such an agreement, do you think it will provide a sufficient legal basis for seabed mining to attract the necessary investment capital?

Mr. KRONMILLER. Senator, I do think there is a reasonable possibility of establishing an alternative regime, a mini-treaty, as it is sometimes called. I think there is a reasonable possibility of establishing a firm basis upon which mining can go forward, whether that be by virtue of a mini-treaty or some other form of arrange-

ment. We have studied this very carefully. We have carried out extensive international consultations. Although it is clear that only the United States among the Western industrialized nations has made a firm decision not to sign the treaty, other states, it seems to us, might find, as we have found, that the regime for seabed mining under the treaty is simply not viable, and that it is possible to maintain nonseabed related rights outside the treaty. And on that basis we believe it is possible that those states will join us outside the treaty in a mini-treaty or some other form of agreement.

Senator PRESSLER. What about the U.S. companies that go to mine if we do not have a treaty? Would the administration consider a proposal to indemnify U.S. deep seabed mining operations against the risk of operating outside the treaty? I guess also I would ask what would those risks be as opposed to being inside the treaty?

Mr. KRONMILLER. To the best of my knowledge and belief, since the President's decision not to sign the treaty, there has been no suggestion by the industry that it seeks indemnification against risks arising out of nonparticipation by the United States in the treaty. If called upon to consider indemnification, naturally we would have to consider it, but it would have to be in light of the broad economic policies of this administration and the long-term economic interests of the United States.

With respect to the risks outside the treaty, I might say that a number have been identified, by those of us in the administration, by private individuals, and by representatives of foreign governments. Certainly, there are legal and political risks facing seabed miners who care to operate outside the treaty. On the other hand, there are legal and political risks and enormous economic burdens to be encountered by miners who would seek to operate inside the treaty, and as the American Mining Congress has testified. As I have noted in my prepared statement, U.S. companies have decided that they cannot and will not operate inside the treaty regime.

So, it appears to me that it is now a situation, so far as the companies are concerned, of finding ways and means of overcoming risks outside the treaty, having already determined that the risks and burdens of operating inside the treaty are intolerable.

Senator PRESSLER. What are the prospects in your view of further amendments to the Law of the Sea Convention to meet U.S. concerns? Will the administration continue to explore the prospects for achieving such changes?

Mr. KRONMILLER. It is the view of the administration that there is no reasonable possibility that the Law of the Sea Convention can be amended now to reflect the President's six objectives. We believe strongly that the Group of 77 has taken a position that is so hard and fast that it is not possible to bring it around to a position which would be acceptable to the United States. Consequently, we have decided not to reengage in negotiations. I might add, I am unaware that we have been invited formally or informally to reengage in negotiations, although there have been suggestions by the representative of some governments that we ought to consider such a course.

Senator PRESSLER. During your appearance before this committee last month, and in following my earlier questions on international

law, I recall that Senator Pell, and maybe I am stealing his thunder here, asked that you provide the committee with a detailed discussion of the administration's views regarding which provisions of the proposed Law of the Sea Convention are representative of customary international law. Can you tell us the status of your response to that request?

Mr. KRONMILLER. We provided a very brief preliminary response. As I am sure you are aware, the full analysis requires an enormous amount of work. There are a staggering number of treaty articles that need to be examined that affect the full range of U.S. legal, political, and economic interests, among others.

I would say that we are a considerable distance from being able to provide the kind of detailed analysis that was requested.

Senator PRESSLER. In other words the bottomline, so that I understand it clearly, is, the administration's position is that we will not be a party to the Law of the Sea Treaty but will proceed independently? Is that correct?

Mr. KRONMILLER. Precisely.

Senator PRESSLER. Thank you. I yield to my colleague, Senator Pell.

Senator PELL. Thank you very much indeed, Chairman Pressler, and congratulations on holding this hearing, which is a real service, not only to the country but, I think, to the world community as well.

In my view, the hearing today should establish a record explaining why in the view of the witnesses the administration failed to successfully negotiate what it considered to be an acceptable treaty. I imagine out of this hearing, and hope it would occur, would come an assessment as to whether or not the possibility still remains for making additional changes in the text of the treaty or the cost of the preparatory commission's drafting of the rules and regulations which will govern deep seabed mining.

I have made no secret of the fact that I am deeply distressed at the President's decision. It seems to me that a complete vacuum exists with respect to U.S. oceans policy. I wonder what preparations the administration has made in order to protect American oceans interests so long as we are going to be outside the framework of the Law of the Sea Treaty. How does the United States intend to insure freedom of navigation and overflight of our commercial and military ships and aircraft after the treaty enters into force? How are U.S. fishing interests, such as those of my own fishermen in Rhode Island, going to be protected? What does the United States intend to do to insure that American scientific research interests will be able to continue unimpeded? I look forward to hearing the answers to these questions as we move along.

I would like to take note of a recently concluded agreement concerning interim arrangements regarding polymetallic nodules of the deep seabed by the United States, United Kingdom, France, and West Germany. I am sure that many here are aware that this agreement is primarily designed to provide a mechanism for the resolution of conflicts over minesite claims among pioneer operations, and an agreement not to recognize minesites prior to January 3, 1983.

It is perfectly consistent with the provisions of the Law of the Sea Convention. Nobody should be under the mistaken impression that this agreement provides an alternative international framework through which deep seabed mining may be undertaken.

My own view, too, is that eventually the United States is going to have to adhere to this treaty. It reminds me a little of the metric system, which we have held out at arm's length, and only we and four small and obscure African and Caribbean nations still use the old English system. We all know we are going to go metric eventually. The question is when. We say our American system is good. It has worked ever since the Indians gave up this country to the pioneers who came here. Let's keep it on awhile. Well, this is exactly the attitude that the administration has regarding this treaty, that if we can go it alone for a little while, we are ahead. But I think every one of us knows deep down in his heart that 10, 20, or 30 years from now the United States, if it is to remain a strong Nation, will have to be a party to this treaty. When, I do not know, but the fact that it will become one is a point on which I think most of us would be willing to lay bets.

There are a couple of questions that I would like to ask Mr. Kronmiller now, if that would be suitable.

Senator PRESSLER. Very much so. Please spend as much time as you like.

Senator Warner is here today with some questions. Senator, we are glad to have you with us today.

Senator Pell, please take as much time as you wish. You are an expert in this area, and we appreciate very much your contributions in this area.

Senator PELL. Thank you very much.

In fact, I think it was in 1967 or 1968 that I drafted the first proposal for an updated regime of law for ocean space, and I have been following this ever since.

Senator PRESSLER. There is no subject in American history that has been written more about or debated longer, and you have been a key part of the whole thing.

Senator PELL. Thank you, sir.

Mr. Kronmiller, as you know, I have tremendous regard for you as an individual and for your intelligence. I voted for your confirmation as Deputy Assistant Secretary of State, although I disagree 180 degrees with your views on this particular area, the Law of the Sea. Is it not true that the Conference adopted a new provision to provide for a seat on the council to that nation which is the largest consumer of minerals?

Mr. KRONMILLER. Yes, Senator, it is true. The Conference did include a provision which specifically provides that the largest consumer of the kinds of minerals to be exploited from the seabed will be guaranteed a seat on the Council.

Senator PELL. But would that not mean that automatically the United States would have a seat on the council? I would think it is inevitable, in calculating consumption in whatever value terms there are, that we would be given a seat.

Mr. KRONMILLER. Senator, I wish it were the case, but in fact it is not. We are not guaranteed a seat on the Council by virtue of that or any other provision. If I may explain, I think it would be of

some help. The problem is, the text does not provide a method of calculation for determining which nation is the largest consumer. If the calculation is on the basis of tonnage of consumption of the metals involved, the United States is second or third behind the U.S.S.R. and perhaps Japan.

If the calculation is value, again, we may find ourselves behind the U.S.S.R. If manganese is left out of the calculation, because it may not actually be recovered from the initial mining operations, then that again changes the calculation, and not necessarily to our benefit. There is, in short, a tremendous uncertainty, and this will not be resolved presumably, until the Preparatory Commission has done its work and until that work has been dealt with by the Council itself.

Senator PELL. But was it not the understanding of the conference—my recollection may be wrong on this--that it would be done on a value basis and not a tonnage basis?

Mr. KRONMILLER. I am not aware of that, Senator.

Senator PELL. I had thought that. I would ask the staff to so ascertain.

[Pause.]

Senator PELL. Are you sure of your facts, that that was not the understanding of the conference?

Mr. KRONMILLER. Senator, if there was an understanding at the Conference of that nature, I am unaware of it. Furthermore, there would be nothing in the treaty text at this time to be of any assistance in that regard.

Senator PELL. Well, this is one of those problems in government where your staff has informed you in one way and mine has informed me in another. I would suggest the two staffs get together to find out just what was the understanding, whether it was or was not the understanding.

Mr. KRONMILLER. Certainly, we can seek clarification. I have consulted with those who were members of the U.S. delegation, and it is their recollection that there was considerable discussion within the U.S. delegation concerning what the calculation would be, and that there was never any conclusion reached by the delegation, nor was there any determination by the Conference on the record concerning how the calculation would be carried out.

Senator PELL. I would suggest our staffs get together to resolve this.

Mr. KRONMILLER. Certainly.

Senator PELL. Let me put my next point in simple terms. What we are doing is saying, this is a pretty interesting treaty. Those cherries that we like we will eat, but those cherries that we do not like we will ignore. Those cherries that we like we say are customary international law, but those cherries that we do not like we say we will not adhere to and will go it alone and have a mini-treaty route.

The answer you gave to your question, as you justly said, was relatively short and not directly responsive to this question. Could you give us a layman's reply now as to how it is that we can look at treaties and take out of them those positions of which we approve, and say we will adhere to those, and that we expect others to adhere to them, and those provisions we do not like we say we will

not adhere to, and it does not matter if others adhere to them or not. I think there are a great many treaties that we would like portions of, but not the whole treaty. It reminds me a little of the arguments that go along about the item veto. It is a reverse kind of item veto. What would be the layman's argument as to how we could do that and why we just do not go through every treaty around the world and take those provisions that we think are fine and say, that is customary international law, but we will not adhere to the others?

Mr. KRONMILLER. Senator, we as a sovereign state are not bound by any treaty, unless and until we agree to become a party to it. Furthermore, it is the case that with respect to certain treaties, existing international law is reflected in certain areas, but not in others. We have researched this rather carefully, and we have found that, in the decisions of the International Court of Justice [ICJ], and furthermore, in the public statements made by various ICJ judges there has been a recognition that only certain sorts of provisions of treaties can be regarded as reflective of law, and indeed, only certain sorts of provisions of treaties can give rise to new international law.

And then it is up to sovereign states to determine whether they wish to be bound. So, it is not a situation where we make a political decision to pick and choose. It is rather a situation in which the process by which international law is made determines what it is that we are going to accept and what it is that we are not going to accept.

Senator PELL. Well, to be very specific, when I started work in this field, there was no such thing as a 200-mile economic zone. Some nations had a 12-mile territorial zone, but it was not recognized as international law. This treaty says that that will be the law. How can we now say that either of these provisions are customary international law when we have not adhered to a treaty certifying to this?

Mr. KRONMILLER. Senator, as you are aware, the law has evolved considerably over the many years the Conference has taken place. We believe that, in a number of areas, new concepts have entered into the law, and with respect to them we have indicated our agreement. In other cases we have indicated we will not be bound. To the extent that the treaty provides a reflection of that law as it has evolved—and I would not cite the EEZ specifically at this time, because our legal analysis is not concluded in that area—we would consider that to be something by which we are bound, something which we must respect.

In other areas, the law has not evolved to provide a new legal regime. One such area is the international seabed. We do not regard the common heritage of mankind as a legal principle, nor have we ever regarded it as such. We have always taken the position that the common heritage of mankind is a statement of political and economic aspirations. I emphasize, it is not law. And that position is reflected on the record of the Law of the Sea Conference, and reflected on the record of hearings before this committee and many other committees of the Congress, as it is reflected in various public statements by several Presidents of the United States.

Senator PELL. What is our definition of a territorial sea? How many miles, 3 or 12?

Mr. KRONMILLER. At this point, we recognize a 3-mile territorial sea.

Senator PELL. So at this point a Soviet vessel under freedom of the seas could come to within 4 miles and there would be no problem?

Mr. KRONMILLER. A Soviet vessel could, in innocent passage navigate right up to the baseline from which the territorial sea is measured, within 3 miles.

Senator PELL. And it could moor there or drift for as long as it wishes?

Mr. KRONMILLER. It could exercise its right of continuous and expeditious transit, so long as it did not carry out an activity which would prejudice the peace, good order, and security of the United States.

Senator PELL. Well, then, do we recognize the 12-mile jurisdiction of other nations, or do we still adhere to the idea that it is a 3-mile jurisdiction?

Mr. KRONMILLER. We have not taken a formal determination at this point as to whether we would alter our position concerning the breadth of the territorial sea.

Senator PELL. What about the economic zone? Do we adhere to the view that there is a 200-mile economic zone, or again do we continue not to recognize that?

Mr. KRONMILLER. At this moment, Senator, we recognize 200-mile fisheries zones. We do not recognize 200-mile economic zones, which involve coastal state jurisdiction extending well beyond fisheries. However, we are undertaking a study, which will lead us to make a determination as to whether we do recognize exclusive economic zones.

On the latter point, I might add that we expect that legislation will be introduced rather shortly in the other body concerning the establishment of an exclusive economic zone by the United States, and so the administration at that point will decisively confront the issue, if not sooner.

Senator PELL. In other words, it involves rights in the water column but not on the ocean bottom. Is that correct?

Mr. KRONMILLER. If we were to have an exclusive economic zone similar to that in the LOS text, we would have jurisdiction both with respect to economic activities in the water column and with respect to the economic activities on the seabed within 200 miles.

Senator PELL. Within 200 miles?

Mr. KRONMILLER. Yes, Senator.

Senator PELL. Well, then, let me get straight in my mind what you are saying: That we adhere to a 200-mile economic zone where we have a right to exploit the resources of both the water column and the seabed, but we only adhere to a 3-mile territorial zone? Is that correct?

Mr. KRONMILLER. At this point in time, we claim a 3-mile territorial sea and a 200-mile fisheries zone.

Senator PELL. But you just finished saying we also believe we have the right to the economic resources in the seabed out to 200 miles.

Mr. KRONMILLER. What I was saying, Senator, was, we expect the introduction of legislation in the other body shortly which would propose to establish an exclusive economic zone involving seabed jurisdiction out to 200 miles.

Senator PELL. But as of now we do not claim jurisdiction over our oil wells in the Gulf of Mexico, for instance, because they are 200 miles out?

Mr. KRONMILLER. That jurisdiction is a function of the Continental Shelf doctrine, not a function of the exclusive economic zone doctrine. We maintain that the natural prolongation of the land mass of the United States is subject to our sovereign rights for the purpose of exploration and exploitation of resources.

Senator PELL. Well, then, do we accept the rubberband theory of President Truman with regard to extending jurisdiction beyond 200 miles as far as the shelf goes?

Mr. KRONMILLER. Yes, Senator, we do. We do not claim at this point jurisdiction over areas of the seabed off the shelf, but within 200 miles.

Senator PELL. But I thought there were some claims further than that, if it was on the seabed and went beyond 200 miles.

Mr. KRONMILLER. Yes, we do claim some areas beyond, but we do not claim some areas within, at this point in time. We have a very extensive continental margin beyond 200 miles.

Senator PELL. I think you can see from the way we are talking the necessity for some kind of law here, and not a picking and choosing of cherries. Another point that I would make is in connection with the no weapons of mass destruction principle on the seabed floor, which emerged from a draft treaty of mine some years back. It said there would be no weapons of mass destruction placed on the seabed. That does not mean that submarines cannot sit on the bed, rather, would be emplaced there. Under the State Department's interpretation, does that mean they will not be placed within 3 miles or 12 miles of our shore and the shore of other nations?

Mr. KRONMILLER. Senator, I am afraid I cannot offer you a reliable response on that point. I am familiar with the treaty only in general terms. I have not dealt with the specific provisions of that treaty. I think we would need to supply you with a response for the record.

Senator PELL. Would you do that, please, because it is a pertinent question. It is a question of whether we could emplant missiles within 3 miles or 12 miles or 200 miles. I think it is a question that should be resolved and answered.

[The information referred to follows:]

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (the Seabed Arms Control Treaty) entered into force for the United States on May 18, 1972. Approximately 100 countries, including the Soviet Union are parties to this treaty.

Parties to the Seabed Arms Control Treaty agree not to emplant or emplace on or in the seabed any nuclear weapons or any other weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons. Obviously, as stated in your question, the prohibition does not apply to submarines resting on the seabed. This prohibition on emplanting or emplacing applies to the entire seabed except the "seabed zone" off the coast of States Parties. Article II of the Seabed Arms Control Treaty

specifies that the seabed zone shall not exceed 12 miles measured from the baseline for measuring the breadth of the territorial sea. Within the 12-mile seabed zone, the prohibition on emplanting or emplacing does not apply to the coastal state.

With respect to this 12-mile seabed zone, the United States and Soviet Union in Article IX.1.(b) of the SALT II Agreement agreed not to develop, test or deploy fixed ballistic or cruise missile launchers for emplacement on the ocean floor, on the seabed, or on the beds of internal waters and inland waters, or in the subsoil thereof, or mobil launchers of such missiles, which move only in contact with the ocean floor, the seabed, or the beds of internal waters and inland waters, or missiles for such launchers.

The Administration, while not supporting ratification of SALT II, has stated it will not undercut existing arms control agreements as long as the Soviet Union exercises similar restraint.

Senator PELL. At one point I made the suggestion that a special emissary be appointed to see if it were still possible to have changes made in the text that would permit this administration to adhere to the treaty. Have any steps been taken in that direction?

Mr. KRONMILLER. This administration has no intention of appointing a special emissary to seek changes to the Law of the Sea text, or even to see if such changes are feasible. We have made a determination in this relation and we see no evidence that would lead us to believe there is any point in pursuing further changes to the treaty.

Senator PELL. I am not surprised, although I am disappointed. You indicated in your testimony that the mining regime proposed by the treaty would preclude private investment in deep seabed mining and would adversely affect important American economic and political interests. What I cannot understand is why would other nations such as Japan and France, pretty economically sophisticated, who voted to support the convention, not share your view.

Mr. KRONMILLER. Senator, I do not believe those two States have made decisions yet concerning signature of the treaty, much less ratification. The administration has decided that it will not sign nor ratify this treaty. The fact that France and Japan voted in favor of adoption of the text I do not believe represents a political decision that the treaty is, in their view, in their interests. That determination is yet to be made by those two countries.

Senator PELL. The custom is, however, that if you vote in support of it, usually you tend to vote to ratify. We are one of the great exceptions in many fields besides this, such as SALT and others. Thank you very much.

Senator PRESSLER. Thank you, Senator Pell.

At this time, I am happy to call upon Senator Warner, who has taken a particular interest in this subject.

Senator WARNER. Thank you, Mr. Chairman. Senator Pell, Mr. Secretary, and others, I have not for some several years kept as closely abreast of this issue as I did in the 1970's when, as Secretary of the Navy, I was a representative for the Department of Defense to the several conferences of the Law of the Sea. At that time, I served under three Secretaries of Defense, one of them Elliot Richardson.

I also note in the audience this morning and listed in the witnesses Mr. Ratiner. Mr. Ratiner was associated with me in those days in the Department of Defense, and I believe both of us at one time or another worked for Mr. Richardson. While I will withhold

any comment with respect to Mr. Ratiner's recent denunciations of positions and policies, he is indeed to be recognized as an expert in this field. He has devoted much of his active career in the past decade to this subject.

My concern, Mr. Secretary, when in the Pentagon was primarily with the navigation rights of the United States, and now, of course, in the Senate it has broadened to all aspects of economic and political situations. Having worked for Secretary Richardson and having formed the highest opinion for his judgment, I am concerned about his beliefs that the United States could face a legal challenge not only to our navigation but perhaps to our seabed mining rights if we are not a party to this treaty. It is a heavy burden for you, and I am interested in having your response to that.

Mr. KRONMILLER. Thank you, Senator.

There was a comment made eariler during this hearing concerning the position of Ambassador Richardson on this issue, and I responded with some passages from statements he had made in various fora over the last several years and up until the President made a decision not to sign the treaty.

Senator WARNER. Do you feel you have adequately covered this question? If so, I will not take up the time of the committee. I was elsewhere at another hearing and could not be here for the start. I will study the record if you think the record reflects adequately your response to that question.

Mr. KRONMILLER. Thank you, Senator. I think it does in very large part. I would simply like to say that there is, unfortunately, a rather substantial inconsistency between earlier statements by the Ambassador when he was representing the former administration before the Congress and when he was representing the United States at the Law of the Sea Conference, wherein he did state that our navigation rights were preexisting to the treaty, that they would continue to exist outside the treaty, that we intended to maintain them, and that the treaty, indeed, did recognize those rights.

We will provide statements for the record along those lines.

Senator WARNER. Thank you, Mr. Secretary.

I thank the chairman for the courtesy of allowing me to ask questions.

Senator PRESSLER. Thank you very much.

Next we will call upon a panel consisting of Leigh Ratiner, former Deputy Chairman of the U.S. Delegation to the Law of the Sea Conference, and Conrad G. Welling, vice president of Ocean Minerals Co.

In addition, it has been suggested that if Mr. Kronmiller could possibly stay until 12 o'clock, there may be some additional questions after this panel.

Could you stay until 12?

Mr. KRONMILLER. Yes, Mr. Chairman.

Senator PRESSLER. Thank you. We may have some additional questions.

At this point we will hear from Mr. Leigh Ratiner, who has been before our committee before and who also is a legend in the Law of the Sea.

Might I ask that we place a reasonable time limitation on statements. If you could summarize it, that would be best because there are several questions that we have. Can you get your statement done in 5 to 8 minutes?

Mr. RATINER. I am sure that I can do it in whatever time the committee feels that I should do it, Mr. Chairman.

Senator PRESSLER. Thank you. Please proceed.

STATEMENT OF HON. LEIGH S. RATINER, FORMER DEPUTY CHAIRMAN OF THE U.S. DELEGATION TO THE LAW OF THE SEA CONFERENCE, WASHINGTON, D.C.

Mr. RATINER. Let me thank you very much for inviting me to appear here today.

Up until very recently, I had been appearing before committees of Congress in my personal capacity. I am a partner in the Washington law firm of Dickstein, Shapiro, & Morin, and up until a few days ago was able to say that I have no client interest whatsoever in the Law of the Sea. Therefore, I should state at the outset that a few days ago I was retained by the United Nations to assist them in setting up the so-called Preparatory Commission and advise them on how to award grandfather rights under the treaty to qualified applicants.

I am not, of course, appearing here in any capacity for the United Nations, but I did want to make that clear at the outset.

I think the easiest way to summarize the testimony which I would have given if I had been able to prepare any, Mr. Chairman, which I have not done, for personal reasons with which the committee staff is familiar, would be to summarize what I heard Mr. Kronmiller say today.

I took very careful notes of his statement since I didn't have a copy in advance, and I derived three basically simple conclusions. The first is that it is possible that there will be an alternative minitreaty regime. He said possible. At one point he said reasonably possible. At another point he just said possible. He did not say probable. He did not say likely. He did not say it was assured.

Second, he said that we have our rights on the high seas, our navigational freedoms, but he also went on to say that it would take a considerable amount of time to complete the Department of State study in response to Senator Pell's earlier request indicating what our rights are under customary law and what our rights are under conventional law or contract law, as this treaty is.

Third, he said that we don't like this treaty very much, so much that we will not even make an effort to improve it.

Frankly, Mr. Chairman, what I find puzzling about those three basic conclusions of Mr. Kronmiller's statement is how we could have decided not to improve the treaty or make any effort to improve it when we don't know the answers to the two underlying questions that affect all our rights and interests, both in navigation and in deep seabed mining.

Now, I would argue—but I don't have to participate in long interagency debates on the subject and therefore can make up my mind somewhat more quickly—that a minitreaty is not foreseeable

and is inconceivable. It is contrary to the interests of the very countries with whom we would have to have a minitreaty.

Let us also bear in mind that we are not talking about just France, Germany, Japan, and the United Kingdom. The Soviet Union will make claims to minesites in the deep seabed. It is not unreasonable to expect those claims to be in conflict with claims made by the United States or the United Kingdom. The Soviet Union will expect satisfaction in respect of their claims. They are prepared and have stated that they have made the requisite investments in deep seabed mining so as to be eligible for grandfather rights treatment under the Law of the Sea Treaty.

Therefore, it seems to me, first, highly improbable that Japan and France will fail to sign and ratify the treaty, but even if they did fail to do so, a minitreaty would not contain all of the necessary parties to resolve legitimate conflicts. The Soviet Union has announced that it will sign the Law of the Sea Treaty, and I assume that it has made that announcement in large part because it wishes to protect its navigational freedoms, which was the principal reason that it entered into this conference in the first place. It was, indeed, also the principal reason the United States entered into the Conference.

With respect to navigational freedoms, I think I am prepared to be quite categorical on the subject. As an international lawyer and as someone familiar with the Law of the Sea from 1966 and intimately involved with it, the 12-mile territorial sea is customary international law, and the United States would find itself virtually isolated in the world if it refused to recognize the legitimacy of any nation's claim of 12 miles.

Second and most important as a corollary, freedom of navigation through territorial seas is not, absolutely not, by any international legal scholar's definition that I know of, a customary law or right through a territorial sea. The Straits of Gibraltar are territorial waters. There is no right and customary or conventional law for freedom of navigation through those straits or over those straits except under the Law of the Sea Treaty which the President has decided to reject.

Mr. Chairman, I began my renewed interest for the Reagan administration in the Law of the Sea with the following bias. I believed the Law of the Sea Treaty was almost as bad as Mr. Kronmiller says it is. I am afraid he has hyped the argument somewhat against the treaty, presumably to defend the President's decision to stay out of it.

The treaty did contain and still contains very damaging and unfortunate provisions. I believed when I began this exercise that a minitreaty, including—I repeat, including, and this is a terribly important proviso—the Soviet Union, Italy, Belgium, the Netherlands, and a few developing countries from each of the continents from which the developing countries come, Africa, Latin America, and Asia, could be a viable alternative. I carried out a study for the Department of Commerce before being employed by the Department of State which led me to exactly the opposite view.

My final view after study, reflection, interview, meetings with bankers, financiers, corporate executives, and foreign governments was that there cannot be stability of investment under a mini-

treaty such as the one I conceived to be an adequate basis for investment, which included the Soviet Union, which I do not think the administration is now seeking, if there were a widely adopted and supported Law of the Sea Treaty which purports to be the sole source of rights for seabed mining.

Therefore, I would have said do not sign this Law of the Sea Treaty if there is a viable alternative minitreaty regime which can be constructed. That was my position. It is no longer my position because I have reached the conclusion that that alternative is simply unavailable to the United States.

Furthermore, since I do not see any way in which the United States can preserve its vital freedoms of navigation through, over, and under international straits except by contesting with coastal states rights which will someday be litigated in the International Court of Justice, with or without participation by the United States, rights which we will surely lose if we stay out of the Law of the Sea Treaty, I have reached the conclusion that the United States is committing suicide if it does not attempt to renegotiate the handful of provisions of this treaty, which, in fact, in my judgment would fail to pass muster in the Senate of the United States.

Those provisions are the compulsory transfer of technology and the review conference and the vast powers of the assembly of the seabed authority. They are all fixable. I say that to you as someone who has had the recent experience of negotiating these changes. Had those been the only issues on the list of demands the United States made, those issues would have been satisfactorily resolved, in my best judgment, and I know what the solutions are and I can tell you what was under discussion at the conference. We failed to achieve those changes because our list was much longer.

Finally, by way of footnote, Mr. Chairman, on this question of whether the United States has a guaranteed seat on the Council, first of all, I think when careful research is done, it will be clear that the records of the Conference are replete with references that it is the value of the minerals concerned and not their weight which was in the mind of the Conference. But more importantly, Mr. Chairman, every country in the world knows that that provision was inserted in the treaty in order to guarantee a seat for the United States of America. And if it isn't clear enough for the administration, I would suggest that they go back to the Conference and have it clarified. I think there would be unanimous support for clarification to that effect.

I do not think it is fair for the administration, nor very wise, either, since as Senator Pell correctly points out, we will one day sign the treaty, to have the administration on record before this committee as saying we do not have a guaranteed seat on the Council of the Seabed Authority. In fact, it was intended that way by 157 countries, and one shouldn't cast doubt on one of the most vital rights we will need to exercise when this country does eventually accede to this Law of the Sea Treaty.

Now, Mr. Chairman, I would be very happy to answer your questions. Thank you.

Senator PRESSLER. Thank you.

First let us hear from Mr. Welling.

STATEMENT OF CONRAD G. WELLING, SENIOR VICE PRESIDENT, OCEAN MINERALS CO., ON BEHALF OF THE AMERICAN MINING CONGRESS, WASHINGTON, D.C.

Mr. WELLING. Thank you, Mr. Chairman.

I am Conrad G. Welling, senior vice president of Ocean Minerals Co. I have been involved in ocean-related activities for over 20 years.

I appear here today in my capacity as cochairman of the Undersea Mineral Resources Committee of the American Mining Congress. Mr. Robert L. L'Esperance, the director of planning and development, mineral resources, of the United States Steel Corp., is the other cochairman of that committee.

Most of the U.S. companies that are participants in international ocean mining consortia are members of the American Mining Congress and have representatives on the American Mining Congress Undersea Mineral Resources Committee. My comments today are based upon the views of those and other interested member companies.

I want to thank the committee for this opportunity to testify on the subject of the Law of the Sea Treaty and other factors affecting prospects for the deep ocean mining industry now and in the future. The subject is of great importance, involving matters that go far beyond the interests of the mining community. Indeed, they affect the national interests and the interests of every U.S. taxpayer and every American citizen.

The American Mining Congress is now alone in its opposition to the Law of the Sea Treaty text on the deep seabed issues. The American Petroleum Institute, which represents some 350 companies in the petroleum industry, is against the treaty. I do not speak for these companies. I am only reporting their position.

Also in opposition to the treaty are: the National Association of Manufacturers, which represents 11,000 member companies and is closely affiliated with 158,000 other companies in the United States; the National Ocean Industries Association; the U.S. Chamber of Commerce; the Licensing Executive Society of the United States, whose members are directly involved in roughly 85 percent of all the technology transfers; the Intellectual Property Owners which represents multinationals in transfers of technology; and the American Patent Law Association which represents more than half of the practicing patent lawyers in the United States.

All these have publicly stated that the treaty is not acceptable from their point of view.

It is not only American companies that are opposed to the Law of the Sea Treaty. The West German Trade Association of Mining, the Federation of German Industry, and the German Association for Deep Sea Technology, among others, are on record opposing signature of the treaty by the West German Government. They, too, conclude that commercial deep ocean mining would be precluded by the treaty.

I would like to submit my written testimony for the record. With your permission, I would like to talk from notes and to emphasize some points that I feel are important.

My background is in new business and technology development. I would like to talk about industrial investment and development risk.

The United States leads the world in the development of new industries and has done so in the past century or more. There is a reason for this.

I believe the main reason is the fact that we have the legal environment, the favorable laws and business environment that encourage the development of new industries. In the past, these included automobiles, aircraft, petroleum, and computers, among others. The latest is the microcircuit industry.

I come from Silicon Valley, so-called, and in the past 20 years we have become the world leaders, the capital of the world in microcircuit development, over all other countries. There is a reason for this. It is because we have a legal environment that encourages the risktaking necessary to develop new industries.

There is a vital link between research and development, per se, and new corporations being developed. Most other countries lack this very vital link. Russia certainly lacks it. There is story after story where the research and development of the Soviet Union and other Socialist bloc countries, their scientific effort, in many areas is equal to ours; yet they are incapable of translating the findings of the scientists into successful industrial applications, and therefore they lag considerably behind us.

All countries of the world, industrial and nonindustrial, lag the United States in development of new industry. There must be a reason for this. One reason, regardless of our complaint about overregulation, is that we, in contrast to other nations, have less Government regulation and control over venture capital, and this is vitally important to the development of new industry.

The present Law of the Sea Treaty text would establish a maximum of control over new industry, equal to anything they have in any type of government worldwide, Russia or otherwise, which inhibits the development of new industry. We need less government, not more government. As far as I am concerned, the treaty text would provide for "infinite government."

Let's talk about investments. Successful corporations have a number of ongoing research programs at various stages of progress. These are reviewed each year. Some are downgraded, some are upgraded, some are maintained. Timing is a very important factor in taking the project out of the lab and into the pilot stage. Once a large-scale investment decision is made, it must proceed posthaste and become a profitable operation as soon as possible.

No corporation will engage in the huge investment required of a new development unless they feel they can complete it successfully and operate it successfully for a number of years in order to recoup the money invested so that they can feed that profit into other new ventures. That is a very important ongoing operation in any corporation.

Now, what are the risks involved in any new investment? We can conveniently divide them into four categories: The legal/political category, the technical category, market/economics, and environmental.

When the deep sea mining program was started about 20 years ago, and I started it at Lockheed, the legal/political problems appeared to be at a minimum. The technical problems, of course, were maximum. Market/economics appeared to be potentially competitive, and in the environmental category, there were few problems at that time. It was just the beginning of the environmental movement.

Since then, though, the risk factors have changed dramatically. Industry now sees the legal/political category as posing the very highest risk problem. The technical risks are acceptable and manageable. Ocean Minerals Co., has spent $120 million to solve the technical problems. We have confidence that we can proceed ahead on a technological basis. Other groups are also confident that the technical problems are manageable.

It so happens, though, that as to timing, the present market and economic risks are not acceptable, but that is a cyclical matter. We know that the markets change back and forth, and maybe in 3 to 5 years it will be entirely different. The environmental risk factors, we believe, are going to be acceptable. There are problems but we think we can handle them.

Now, what about the time and costs of developing a deep ocean mining industry? As I indicated, Ocean Minerals Co., has spent $120 million so far on research and development. In research and development, you find out what your problems are, and this is extremely important. In any endeavor, if you know what your problems are, your success rate in what you can accomplish is very high in accomplishment. We feel now we know what our problems are.

Ocean Minerals Co., would have to commit about $250 million to $300 million over about 5 years to solve the problems and we feel confident we can solve them. They are straightforward engineering problems. At that point, then, the consortium would have to spend $1 billion or $1.5 billion over 5 years for a commercial plant. Thereafter, it would take 5 or 10 years, depending upon the markets, for an on-going commercial operation, to get our money back, to make the program profitable.

So we have a commitment, then, for 15 to 20 years. We require legal and political stability for that period of time, or at least that the risks are low enough so that, commensurate with other risks, we would make that decision to move ahead.

As to the Law of the Sea Treaty, it is the view of the American Mining Congress that the treaty would provide a powerful global bureaucracy, greater than anything we have ever seen. It would be unacceptable for investment by any established industry, let alone a new industry.

As I said earlier, we need the type of rules and regulations and investment climate we have in the United States, which is the best in the world, to establish a new industry. That is the reason the United States leads the world in the establishment of new industries and will continue to lead the world as long as we have that kind of legal environment.

Just what is wrong with the treaty? Let me list a few of the objectionable features. First, access to the seabed deposits is not assured. And I speak from the point of view of trying to secure in-

vestment. I do not have the money. I am a developer. I have to go elsewhere for the money. The corporations that I have talked to—at least 50 to 75 of the top corporations of the Fortune 500, in this regard have indicated that the risks are too high for investment under the treaty. Second, there is no sanctity of contract. Third, the treaty's production controls are absolutely unacceptable. Fourth, the forced transfer of technology is completely unworkable. That is the way the treaty is written.

Let me talk a bit about transfer of technology, because it is a buzz word to many people and they do not understand it. There is great misconception about what is meant by transfer of technology.

There are many stages in the transfer of technology. The scientist, when he completes the operation in the laboratory, thinks he has technology, but he does not. The engineer who believes he has a successful pilot plant thinks he has technology, but he does not. The corporate manager, when he first has the plant operating thinks he has technology, but he does not. It is when the corporate financier, or the banks, start getting return on their investment, that you have technology. This is the technology that is viable and transferrable. That stage is at least 10 or 15 years away from the startup point of a new industry. It would be impossible to transfer effective technology until that point is reached.

How can we assure anybody on the startup date that we will be able to effectively transfer technology in 15 years, or at any time? It is a very delicate matter, and is not easy. There are many failures in transfer of technology even within large corporations. On occasion, even the Lockheed Corp. and other companies have failed in their efforts to take emergent technology out of the laboratory and move it into the commercial marketplace. That is the history of it even in highly industrialized society, let alone trying to transfer a highly complex technology to others who have little or no knowledge or experience in the field. Therefore, viable technology cannot be transferred until ocean mining is in operation, fully developed, and earning a return on investment.

Moreover, third-person technology, third-person transfers are involved. The way the Law of the Sea Treaty reads—my interpretation of it, and the way industry reads it—is that unless we can guarantee the transfer of technology of the subcontractors, then we cannot use it.

I haved learned from long years of experience that the development of large, technologically complex systems requires hundreds, even thousands, of subcontractors. That is not generally understood. At least 75 percent of the technology that we will use in a new system belongs to other corporations, or subcontractors. IBM is an example. We use their computers. In addition, in trying to develop a system, we depend heavily upon the subcontractors spending their own money to help customize the equipment to our needs, to our systems.

This, cooperation is difficult under the best of conditions, but impossible under the present treaty terms. These terms, terms of technology transfer, were put together by people who do not understand the subject at all.

This, among other reasons, is why we have come to the conclusion that we cannot invest under the treaty. It is a door closed to

us. If you are trying to achieve an objective, and one door is absolutely closed to you, then you try to look at other ways of getting there. We are not saying we have any assured route at the present time, but I can say that under the present U.S. legislation, it gives us a possible route to go.

My consortium, Ocean Minerals Co., and four other consortia that are involved in deep ocean mining, the so-called pioneer explorers, have signed arbitration agreements. We have agreed to arbitrate our differences so that when we do apply for licenses, I mean, when we modify our exploration licenses—we have already applied for them—we will not have conflicts. We feel we can resolve these differences without difficulty.

Senator PRESSLER. I am sorry, Mr. Welling, but I will have to ask you to summarize the rest of your statement. I am told by staff that time is running out.

Mr. WELLING. Thank you. I will. Since the United States offers the most favorable environment for new industry—and that is unarguable, we desire to proceed under U.S. laws if at all possible. We have to find a way of doing so. We cannot proceed under the treaty.

There is one further remark that I would like to make, Mr. Chairman, and that is, we cannot just think of the future of ocean development in terms of the manganese nodules alone. There are tremendous, vast resources in the ocean. The ability, the power, to develop those represents just the beginning of a new industry—and it must not be lost to us. Our knowledge of the ocean floor is absolutely at a minimum.

As I have explained in my talk to the space engineers at Cape Canaveral, we are just on the verge of really discovering something like a new planet in the solar system, and that is the ocean floor. Our knowledge of it is very, very minimal. Yet, with new exploration equipment being developed at the present time, there will be vast new discoveries made, and we must have a legal and political regime that will encourage U.S. industry to take the high risks necessary, obtain the venture capital, and proceed. Otherwise, ocean mining can only proceed at a very slow pace if at all, with government subsidies. We are not asking for that; we do not desire it. We want to proceed under U.S. laws and regulations under the free enterprise system.

Thank you.

[Mr. Welling's prepared statement follows.]

PREPARED STATEMENT OF CONRAD G. WELLING

I am Conrad G. Welling, Senior Vice President of Ocean Minerals Company, and I have been involved in ocean-related activities for over 20 years.

I appear here today, however, in my capacity as Cochairman of the Undersea Mineral Resources Committee of the American Mining Congress (AMC). Mr. Robert L. L'Esperance, the Director of Planning and Development—Mineral Resources of United States Steel Corporation is the other Cochairman of that Committee.

Most of the U.S. companies that are participants in international ocean mining consortia are members of the American Mining Congress and have representatives on the AMC Undersea Mineral Resources Committee. My comments today are based on the views of those and other interested member companies.

The American Mining Congress is an association encompassing a wide spectrum of mining interests, both land-based and seabed interests, and includes: (1) Producers of most of America's metals, coal and industrial and agricultural minerals; (2)

manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry.

I want to thank the Committee for this opportunity to testify on the subject of the Law of the Sea treaty and other factors affecting prospects for the deep seabed mining industry now and in the future. The subject is of great importance, involving matters that go far beyond the interests of the mining community. Indeed, they affect the national interest and the interests of every U.S. taxpayer—every American citizen.

As you are well aware, the negotiations on the Law of the Sea have a long history, but with reference to deep seabed aspects, I would like to emphasize three recent actions:

The first was on January 29, 1982, when President Reagan announced the six basic objectives that the United States would seek in the negotiations—those objectives are well known to this committee and I will not repeat them;

The second action was on April 30, 1982, when the U.S. Delegation to the Law of the Sea Conference voted against the treaty because it met not one of the U.S. objectives;

The third action was on July 9, 1982, when the President announced that the United States would not sign the treaty convention as adopted by the U.N. and that the U.S. participation in the remaining conference process would be a technical level involving only those provisions that serve U.S. interests.

The American Mining Congress commends the President for his defense of fundamental principles and leadership in his decisions concerning the Law of the Sea. We strongly support the President's position.

The Undersea Mineral Resources Committee of the American Mining Congress has recently developed a detailed statement, commenting on the proposed Law of the Sea Treaty. It proposes additional steps in support of the President's decision and to carry out the intent of the Deep Seabed Hard Mineral Resources Act of 1980. A copy is attached to my written remarks and should be considered as part of my testimony.

The American Mining Congress has over the years supported the concept of a fair and equitable Law of the Sea treaty that would provide a stable legal and political environment. But we have also felt that a comprehensive, universal treaty having serious defects would be worse than no treaty.

From industry's standpoint, the Draft Convention that was on the table at the opening of the Eleventh Session of UNCLOS III in March this year had extremely severe defects. The treaty text that was approved by the Conference on April 30, and voted against by the United States, contained no substantial improvements. Indeed, Mr. Chairman, notwithstanding its many changes in phraseology, the substance of that text is not essentially different from the 1977 negotiating text that the then head of the U.S. Delegation labeled as fundamentally unacceptable.

Industry has long favored less government, not more. The Law of the Sea Treaty would result in:

A government controlling an area that exceeds half the entire globe;

A government by an "International Seabed Authority" with legislative powers (in contrast to the United Nations that has none) and with a huge bureaucracy able to approve or deny access to seabed resources;

A government dedicated to the principles of the New International Economic Order;

A government in which the voting arrangements would reduce the voices of the United States and other Western nations to bare whispers.

The Law of the Sea Treaty would strip the United States of any status in the Seabed Authority commensurate with its international stature, influence and activities. At the same time, the United States would pay the highest assessment for the budget of this new government for an indefinite period (i.e., 25 percent in accordance with the rate of the U.S. contributions to the United Nations' budget), plus financing for the establishment of the Enterprise, the mining arm of the Seabed Authority.

For a variety of additional reasons, the Law of the Sea Treaty does not provide a basis for U.S. industry to invest in either the prerequisite developmental activities or in commercial-scale ocean mining operations.

First, the treaty does not provide U.S. firms with assured and nondiscriminatory access, under reasonable terms and conditions to seabed minerals.

The so-called PIP Resolution ("Preparatory Investment in Pioneer Activities") creates doubtful and costly rights for the existing consortia, freezes out all new entrants from the United States, and provides for special protection until 1985 for

Third World consortia, not yet formed. The PIP Resolution is, consequently, not an effective solution for the existing pioneer investors.

Application procedures place too much discretion in the hands of the Seabed Authority, discretion that can be used to deny contract approvals. All of these features, in combination with a specific quota system that would limit the number of applicants that any one nation may sponsor for ocean mining contracts, make access by U.S. firms anything but assured.

A second deterrent to investment is that security of tenure is lacking; there is no sanctity of contract:

Subsequent changes to initial rules and regulations that may be applied against existing operations may undermine the system under which a contractor first begins mining operations;

Other provisions grant the Assembly power to adopt and recommend that other organs of the Seabed Authority adopt "improvements" in the mining regime every five years—the term "improvements" is not defined;

The resolution of a disagreement between the "supreme" Assembly and other organs is unclear;

Disputes—such as those related to the Authority's refusal to grant contracts, or, abuse of its discretionary authority—are not subject to review by impartial arbitral panels; charges that the Authority has abused its power or discretion are generally not reviewable even by the disputes settlement bodies established by the treaty;

The arbitral panels are not empowered to render any decisions that involve interpretations of the treaty.

A third deterrent is the system of production controls in the LOS treaty:

The treaty establishes an array of inflationary and market-distorting production controls. Such controls may arise not only through the application of a retrogressive production formula, but through implementation, by the International Seabed Authority, of decisions reached by an international commodity conference that could well be controlled by the International Seabed Authority itself.

Other provisions would grant priority to the applications of the Enterprise or developing nations for production authorizations under the restricted production ceiling.

A fourth deterrent relates to the mandatory transfer of technology that the treaty would impose:

The system of mandatory technology transfer to both the Enterprise and developing nations limits effectual access to the seabed because it provides a means by which the Authority may revoke contracts.

Technology owned by third parties may not be used by the ocean miner if he is unable to obtain written assurances that the third party technology owner will also agree to transfer that technology to the Enterprise and to developing nations.

It should be clear from this litany of ills that, in essence, the Law of the Sea Treaty would demand that the developed nations of the world supply the know-how and the capital to develop deep-sea mining, but leave the ownership and control of the resources to the developing nations. As one writer, Stephen Chapman, said in an article in the April 21, 1982 issue of The New Republic, the message to the West would be: "You provide the money, the technology, and the entrepreneurial daring to mine the seabed; we'll write the rules."

Nor does the treaty text in any way meet the conditions expressed in the Declaration of Congressional Intent in Section 201 of the Deep Seabed Hard Mineral Resources Act, an act in which this Committee played a key role, and that provided, and still provides, a foundation stone essential to this infant industry. Contrast, if you will, the deficiencies in the treaty text that I have enunciated and the Declaration of Congressional Intent.

Section 201 states as follows: "It is the intent of Congress—

(1) That any international agreement to which the United States becomes a party should, in addition to promoting other national oceans objectives—

(A) provide assured and nondiscriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed for United States citizens, and

(B) Provide security of tenure by recognizing the rights of United States citizens who have undertaken exploration or commercial recovery under title I before such agreement enters into force with respect to the United States to continue their operation under terms, conditions, and restrictions which do not impose significant new economic burdens upon such citizens with respect to such operations with the effect of preventing the continuation of such operations on a viable economic basis;

(2) That the extent to which any such international agreement conforms to the provisions of paragraph (1) should be determined by the totality of the provisions of

such agreement, including but not limited to, the practical implications for the security of investments of any discretionary powers granted to an international regulatory body, the structures and decisionmaking procedures of such body, the availability of impartial and effective procedures for the settlement of disputes, and any features that tend to discriminate against exploration and commercial recovery activities undertaken by United States citizens; and

(3) That this Act should be transitional pending—

(A) The adoption of an international agreement at the Third United Nations Conference on the Law of the Sea, and the entering into force of such agreement, or portions thereof, with respect to the United States, or

(B) If such adoption is not forthcoming, the negotiations of a multilateral or other treaty concerning the deep seabed, and the entering into force of such treaty with respect to the United States.

Clearly, the treaty text meets none of the conditions included in the Congressional statement of intent. It is equally evident that the President's statement of objectives of January 29, and his decision announced on July 9, are totally consistent with the criteria specified in Section 201.

It is to be hoped that those who participated in the enactment of the Deep Seabed Act will continue to support it, as well as the President's decision. Funding reauthorization for the Act is needed now. Further implementation of the Act is essential in order for U.S. mining companies to continue their efforts.

Mr. Chairman, U.S. deep sea mining interests are not alone in their reactions against the Law of the Sea draft treaty. The West German Trade Association for Mining, the Federation of German Industry and the German Association for Deep Sea Technology, among others, are on record opposing signature of the treaty by the West German Government, citing many of the same reasons that the U.S. industry does. They, too, conclude that commercial deep sea mining would be precluded by the treaty. They, too, favor an alternative approach based on reciprocal arrangements among nations interested in ocean mining.

And in our own country, the record shows that some of the largest and most influential business groupings, with a sweeping range of interests are opposed to the treaty. To list some of these, they include:

Our own American Mining Congress;

The American Petroleum Institute;

The National Association of Manufacturers;

The National Ocean Industries Association; and

The U.S. Chamber of Commerce.

Three groups with special interests in technology transfer issues are also critical of the treaty. They include:

The American Patent Law Association;

Licensing Executives' Society; and

Intellectual Property Owners, Inc.

This listing, Mr. Chairman, demonstrates that there is an impressive array of viewpoints in the nation that are opposed to the treaty.

I would like to turn, now, to a discussion of how companies have viewed the risk factor in deep sea mining. Since member companies began their research in deep seabed mining some seventeen years ago, they have considered future investment from the standpoint of four categories of risks: technical, environmental, economic and political/legal. Initially, we saw the principal risks as being technical, economic, and environmental in nature.

After an investment of hundreds of millions of dollars, the technical risk has been substantially reduced.

Based on work to date and the scientific studies of the National Oceanic and Atmospheric Administration and of independent scientists, the environmental risk is not excessive.

As to the economic risk, the market forces will determine when it is manageable and when commercial exploitation is feasible. At the present time, the minerals market is weak and the immediate future of that market is highly uncertain.

The political/legal risk is today even more uncertain for long-term commercial investment in deep seabed mining. This political risk must be reduced.

The four consortia containing U.S. companies have already invested several hundred million dollars in deep seabed mining research and development and exploratory work, and they have applied for licenses under the Deep Seabed Hard Mineral Resources Act to conduct additional exploration. Larger investments of from $1.5 billion to $2 billion each must await the resolution of conflicts involving overlaps in applied-for areas of the ocean floor, the award of exploration licenses and mining permits, and the completion of necessary exploration.

The issuance of U.S. exploration licenses is not expected much before 1985, and the exploratory work done in compliance with the Act and applicable regulations could take up to 10 years. Therefore, there is ample time for improvements to be made in the legal/political arena.

No decision on final, full-scale commercial investment is likely to be made for another five-to-ten years. During that period of time, the legal/political risk could be reduced by continued progress in the development of effective international arrangements, or by substantial improvements to the Law of the Sea Treaty, the latter appearing to be a highly unlikely prospect.

To the best of my knowledge, none of the five existing ocean-mining consortia, including the French government-owned group, has decided it will invest under the treaty (assuming economic conditions were favorable), simply because the treaty, by its very terms, discourages investment.

Let me point out what several consortia have accomplished in private negotiations pursuant to the Deep Seabed Hard Mineral Resources Act, while the Law of the Sea talks and the reciprocating states negotiations were proceeding at the governmental level. In the spring of 1982, the four consortia that include U.S. companies, as well as the French group, completed negotiations and signed a private arbitration agreement that would provide a means for seeking to resolve possible overlapping claims among them.

In July, the consortia signed an agreement to protect the confidentiality of information that they exchange. And on July 13, four days after President Reagan announced his decision on Law of the Sea, they exchanged coordinates on the areas for which they seek licenses to pursue further exploratory and development work.

Consider, also, that those developments involved companies or their subsidiaries from no less than nine countries, eight of which have been engaged in the RSA negotiations. The eight include the United States, United Kingdom, Federal Republic of Germany, France, Belgium, Netherlands, Italy and Japan. The ninth country is Canada.

Moreover, there has been recent progress in deep sea mining at governmental levels outside the context of the Law of the Sea Treaty. I speak of the "Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed", signed by the Governments of the United States, United Kingdom, Federal Republic of Germany and France on September 2 in Washington, D.C.

In essence, the agreement provides for the resolution of conflicting claims to areas of the ocean floor filed by so-called "Pre-Enactment Explorers". Pre-Enactment Explorers are those who on or before March 12, 1982, filed applications for further exploration activity under deep seabed legislation enacted by any of the signatory nations. The agreement also provides for consultations among the signatories before any authorization for seabed mining operations is issued.

We welcome this agreement. It is a significant development because it includes the governments of the four nations most capable of conducting actual deep sea mining.

It is encouraging to the U.S. deep sea mining industry because, as I have tried to make clear to you, mining under the proposed Law of the Sea Treaty is not feasible, whether or not the United States joined that treaty. Under the treaty, the door is shut to us. But agreements with other individual countries offer another recourse. This interim agreement is a step in that direction and could be a step toward an effective alternative regime under the terms of the 1980 Act.

In the past, the American Mining Congress has viewed a reciprocating states agreement under the terms of the 1980 Act as an interim arrangement, looking toward the time when a fair and equitable Law of the Sea Treaty would eventually be in place. Now we see such reciprocal arrangements as the most viable basis for achieving a suitable alternative regime.

I would like to quote an excerpt from the American Mining Congress Declaration of Policy concerning undersea mineral resources that was published in September 1981, an excerpt that is still relevant:

"The essential element is agreement on appropriate legal arrangements among like-minded nations to observe similar rules and regulations and mutually respect exclusivity granted by participants. Thus, the recognition by a core of nations having the necessary capabilities to achieve commercial exploitation of a right to explore and commercially mine the deep seabed is an important element in providing a stable legal/political environment. Recognition by a larger group of nations would, of course, enhance the security of such rights.

"We continue to believe that a satisfactory investment climate can be created and the basic conditions met by building on the existing U.S. Public Law 96-283."

There are those who say, that the U.S. deep sea mining companies will flee to foreign shores. There are those who say that investment capital can only be attracted under the treaty.

Mr. Chairman, the advocates to whom I refer do not come from the deep sea mining industry and they do not represent the mining industry or speak for it.

I cannot speak for all the consortia, but my consortium has not filed, and does not intend to file, an application under the law of any country other than the United States, and I know of at least one other consortium that is in the same position.

As to investment under the treaty, investment analysts with which I have contact are firmly of the view that there is too much uncertainty and risk under the Law of the Sea Treaty.

Mr. Chairman, there are leading treaty advocates who argue that outside the framework of the Law of the Sea Treaty, deep sea minerals mining is doomed. But I would argue that if the treaty text is deeply flawed—as it most assuredly is—it makes no sense, in my view, to say, "Yes, the treaty is flawed, but we should join, because that's our only real hope." I submit that if something is fatally flawed, you don't join it; you seek something that is better.

It is in the enlightened self-interest of all nations, whatever their political or economic philosophy, that ocean mining companies progress through their present research and development stage, then through the pilot plant stage, and finally into commercial operation. We submit that building upon the present United States, United Kingdom, French and West German legislation--in lieu of the LOS treaty—is the most viable means of facilitating access to, and development of, ocean minerals.

Mr. Chairman, I thank you and the Committee for your interest in this important matter.

Attachment.

AMERICAN MINING CONGRESS STATEMENT ON LAW OF THE SEA, JULY 23, 1982

The oceans of the world contain large deposits of untapped and to a large degree unknown resources. Some of the known resources contain materials--such as manganese and cobalt, among others—which are of strategic and critical importance to the economy and security of the United States and other nations. The wise development of these resources requires the establishment of a stable and realistic regime under which investors with the necessary capital and skill can exercise their historical right of freedom of the high seas and pursue deep seabed resources in a secure, reasonable and nondiscriminatory manner.

On January 29, 1982 the President made a definitive statement concerning U.S. policy with respect to the draft Law of the Sea Treaty then under consideration by the Third U.N. Conference on the Law of the Sea, which was a praiseworthy recognition of this and other important requirements of the United States. The President declared the treaty to be fundamentally unacceptable with respect to deep seabed mining and announced the desire to further negotiate an acceptable treaty that:

Would not deter development of any deep seabed mineral resources to meet national and world demand;

Would assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;

Would provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;

Would not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

Would not set other undesirable precedents for international organizations; and

Would be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

On April 30, 1982, the U.N. Conference approved the proposed treaty over the dissenting votes of the United States and three other nations, with seventeen nations abstaining, including the United Kingdom, the Federal Republic of Germany, Belgium, Italy, the Netherlands and the U.S.S.R. The United States quite properly voted against the treaty because it fails to meet even one of this nation's publicly announced objectives or concerns.

The proposed treaty would make private investment in deep seabed mining highly unlikely, if not impossible. Even the Preparatory Investment Protection (PIP) Reso-

lution, a last-minute addition alleged to be a concession by Third World participants, fails to provide conditions which would allow investment. That Resolution contains inadequate assurances of access and security of tenure for development of resources under fixed and reasonable terms and conditions. It would require existing pioneer investors to train, transfer technology to and finance an Authority empowered to select and acquire without compensation areas researched by pioneer investors. Indeed, the Resolution would have the effect of barring any new U.S. entrants (those not presently involved on a large scale).

The treaty would also establish a new and disproportionate political and economic order. It would grant special sovereignty to an International Seabed Authority which will make sovereign decisions affecting over one-half of the earth's surface on a one-nation, one-vote basis, a principle having no rational basis or precedent in the actual governance of international relations among sovereign states. This would allow Third World participants to overwhelm developed nations on major policy decisions. Further, it would create a system of government in which the political and economic interests of the United States and other developed nations are not fairly represented and which fails to adequately recognize the financial contributions to the Authority by the United States and her allies, or other nations.

This treaty as related to deep seabed mining would operate contrary to historic international principles by:

Providing for a Review Conference which will be allowed to impose amendments to such treaty on all participating states upon ratification by three-fourths of the member states, thus binding the United States without the constitutional necessity of obtaining the advice and consent of the Senate;

Allowing national liberation groups to participate in the affairs of the Authority and to receive economic aid from the proceeds of deep seabed mining by the Authority; and

Purporting to abolish the existing rights of freedom of the high seas of nations which do not ratify the treaty.

Such a treaty would establish undesirable and far-reaching precedents by:

Serving as the established vehicle for governing other future oceanic activities; and

Serving as a model for future negotiations related to such matters as outer space activities, radio wave use, and jurisdiction on the continent of Antarctica.

The American Mining Congress strongly supports the President's position that the United States will not sign the proposed treaty and encourages him to remain firm in his decision. We further encourage the President to communicate to other nations that:

Such other nations, in particular those already dissenting or abstaining in the April 30, 1982 vote, are urged to join the United States in declaring that they will not sign the treaty;

The United States considers the past and future development of deep seabed resources a reasonable exercise of freedom of the high seas, a right which will be protected by the U.S. Government;

The issuance of licenses and permits by the United States domestic legislation is a legitimate exercise of regulatory powers permitted under general principles of international law, including the doctrine of freedom of the high seas;

The United States encourages the establishment of reciprocal arrangements with our allies and other states having compatible domestic legislation concerning deep seabed mining, in order to assure free access and security of tenure to private enterprises and states alike seeking to develop deep seabed resources; and

The United States will fully recognize reasonable and consistent practices of other nations in their exercise of the freedom of the high seas.

These steps would provide the basis for access to ocean mining for all economically, environmentally and financially sound projects, uphold the freedom of the high seas, and maintain the established principles governing the international relations between and among sovereign states.

Senator PRESSLER. Thank you.

Mr. Ratiner, you have stated that you believe a number of substantial changes would have been negotiated to the present treaty text if the United States had been willing to adopt a more pragmatic attitude toward its stated objectives. What basis do you have for drawing such a conclusion?

Mr. RATINER. Mr. Chairman, as you know, I was the principal negotiator at the conference in February, March and April, and

participated in all negotiating sessions, small and large. It was quite clear to me as a negotiator that the United States had at all times during the conference session overloaded the circuits of what was double. Now, let me give you a single example.

You have heard that the treaty provides for benefit sharing with liberation movements. The treaty also gives any member of the Council a veto over such benefit sharing. The developing countries and many others with whom that provision of the treaty was delicately negotiated in the previous administration, the Carter administration, felt that a veto for a country that has a guaranteed seat on the Council over benefit sharing with liberation movements was probably a fair and reasonable compromise.

My own view is that it probably is, too. I would have preferred seeing the treaty done a little bit better in the Carter administration, but it was on the list of absolute demands that United States had to have along with a dozen other absolute demands which made it impossible to convince the 157 other countries at that conference that the United States within the time period available for renegotiation of that treaty was serious—that the United States really wanted this treaty.

In all of the advice that I provided the administration, I said that it was essential for successful negotiation that we convince the rest of the world that if we achieve our objectives, we will in fact support the treaty and submit it to the Senate for advice and consent.

It became very clear to virtually all countries during that session and even at the very closing days of that session that the United States had an appetite so ambitious and so unreasonable that they reached the inescapable conclusion that we did not wish to meet our objectives because we would not in any event be willing to support the treaty. That was an impression which we could not as negotiators erase with the long list of demands we had.

Senator PRESSLER. What specifically do you think will be the cost to U.S. interests of a failure to become a party to some convention? Are there damage-limiting steps which might be taken to reduce these risks?

Mr. RATINER. I think the risks of failure to join this convention are that we will lose in international litigation and practice the navigational freedoms that we have so painstakingly secured in this treaty. Second, we will lose the deep seabed mining industry. I sit here fascinated by Mr. Welling's comments that he wants to operate under a free enterprise system like the one in the United States. He will never do so in the seabed. That is very unfortunate. I would like to see him operate under a free enterprise, no bureaucracy regime also. But it will never exist. There is no such thing for the seabed.

World practice has gone too far now. The world will set up an international seabed authority. The world will purport to issue exclusive rights to mine. The world will refuse to recognize Mr. Welling's rights to mine under U.S license, and Mr. Welling will never be able to raise sufficient capital to invest in deep sea mining under those circumstances.

Now, you ask what can we do to ameliorate this problem. I made a proposal in the Journal of Foreign Affairs several months ago, which was that we take a hard look at the problems that would

obstruct ratification of this treaty in the Senate, that we go back to the conference and repair them. I identified the three areas in which I thought this treaty would fail to pass muster in this very committee.

As you know, Mr. Chairman, I have some passing familiarity with this committee on a variety of treaties and subjects. So I made my best assessment as to what would kill the treaty in this committee, and I recommended that those three areas be renegotiated. The administration obviously is in no way bound to accept my advice. It did not, and therefore I see no way of ameliorating the damage which the administration has now brought on itself.

Senator PRESSLER. We do have your article, "The Law of the Sea: A Crossroads for American Foreign Policy," which you recently wrote. I thought it was very scholarly. Let me say that recently I was involved in a discussion of this issue at a dinner. If all of the really thoughtful articles that have been written over the years on the Law of the Sea in Foreign Policy, Foreign Affairs, and other scholarly journals were put together in a book, we were speculating as to what the name of it would be, but we reached no conclusion.

In any event, it is a subject that has gone on for years.

Let me agree with you that Mr. Welling's comments were most fascinating this morning. I will address a couple of questions to Mr. Welling, and then will call on Senator Pell.

Mr. Welling, I might compliment you on your forthright presentation here, and if you did not get to state all of your remarks, we will make them a part of the record. Let me ask you this. Has your company or the consortium of which it is a member made any formal determination regarding its intentions? If not, on what do you base your assumptions about the viability of mining outside the Law of the Sea Convention?

Mr. WELLING. Mr. Chairman, we of course carefully evaluate our investment opportunities each year. Beginning with the Law of the Sea Conference many years ago, we felt we could operate under the Law of the Sea Conference as it started, but in fact it deteriorated as time went by, from an investment point of view. The way the text was written, its regulations became more and more restrictive. At the same time, we felt that it was essential to have U.S. legislation, which we supported strongly.

At the present time, without question the only route industry has open to us is to proceed under U.S. legislation. We have applied for exploration licenses. Industry is spending money to continue to proceed along that line. We of course recognize today that we do not have a clear route open to us, but as I have indicated, it is the only route we have.

We certainly expect the United States to give us exploration licenses, once we have settled overlapping claims, and we have confidence that we will do that. Once the industry has exploration licenses, we of course expect that the agencies involved will then bring forth the mining regulations, and we will apply then for mining permits. At each step along the way, we will evaluate our risk. We know we have to proceed that way because we have no other way of proceeding.

I cannot at the present time forecast when industry will be able to make the huge investments necessary for commercial oper-

ations. At some future time, if Ocean Minerals Co. did not expect that we would be able to do so, we would then discontinue completely.

Senator PRESSLER. To ask a layman's question, what is going to happen now? Are we going to have mining? Are U.S. companies going to be able to mine now that we have made a decision, or can you just go ahead and do it and go forward with it, or is that what you are going to do?

Mr. WELLING. As I have said, we have not made that decision because of the huge investment that is necessary, but when we come to the conclusion that we can proceed then we will initiate the huge investment that is required, but we are not going to initiate it because of the time value and money. It is like starting a building. You do not put down the foundation until you have the legal rights to the land, and essentially we are in that situation.

Senator PRESSLER. Well, then, how are we going to get those legal rights for you?

Mr. WELLING. Under U.S. regulations. Now, I am not qualified to give you answers on legal questions, so all I can say is, when the time comes, then our own legal advisers and the board of directors will make a decision of whether the political/legal risks are too high, considering all other risks, as well. Let me give you an example. If we happened to stumble across a very rich resource, and this is hypothetical, and we could develop it within a few years and get our money back in a few years, then we would say, well, the legal risks may be very high, but the other risks are so low that we would maybe weigh that and then take the chance. But when the development time is very, very long, then the legal risks are a big factor.

So, we have to take all of these factors into consideration when we make a decision, and I cannot predict today what the decision will be or when it will be made. All we are doing now is preparing ourselves so that we will be in the best position to make a decision when the time comes. We have not abandoned the program.

Senator PRESSLER. Then, you are ready, willing, and eager to go and mine. It is just that we have to find a legal basis for it.

Mr. WELLING. That is exactly right.

Senator PRESSLER. Would you expect to be insured or indemnified by the U.S. Government if you took a loss? Do you think we should set up some kind of insurance program?

Mr. WELLING. That is not in our plans. We do not seek it. We feel that we should go ahead based upon other factors, not insurance. From my point of view, I think it is a poor way of proceeding.

Senator PRESSLER. I hope we can get something going, because I think the world is suffering for not having mining of the riches of the seabeds. I think we need to proceed with that business, don't we?

Mr. WELLING. Mr. Chairman, I couldn't agree with you more. I feel that it has taken many years to develop the ocean resources, just like the offshore oil which now supplies 20 percent of our oil and will continue to supply more and more of our oil in this country. I firmly believe it is going to be the oceans in the future that will supply a large portion of the minerals for the economic development of the world.

Senator PRESSLER. I will now yield to Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

With your permission, I would like to have inserted into the record two articles. One is the Foreign Affairs article by Mr. Ratiner, and the other from Fortune magazine, not a left-wing organ, entitled "The Reaganites' Misadventure at Sea." I request that these two be inserted into the record.

Senator PRESSLER. Without objection, it is so ordered.

Senator PELL. Thank you.

[The material referred to follows:]

[From Foreign Affairs]

THE LAW OF THE SEA: A CROSSROADS FOR AMERICAN FOREIGN POLICY

(By Leigh S. Ratiner) [1]

On April 30, the United States was the only Western industrialized country to vote against the final treaty adopted in New York by the Third United Nations Law of the Sea Conference. Venezuela, Turkey and Israel also voted no. The U.S.S.R. and most Soviet bloc countries abstained, as did a few highly industrialized Western nations. Most of the West, including France and Japan, joined the Third World and voted yes. Altogether, 130 nations voted to adopt the treaty and open it for signature.

The final treaty falls short of the goals sought by the Reagan Administration. It establishes a mixed economic system for the regulation and production of deep seabed minerals and, as a matter of principle, the Reagan Administration could not, consistent with its free enterprise philosophy, have done otherwise when the time came to vote.

Unfortunately, our strong and uncompromising defense of principle may have cost us a golden opportunity to convert the treaty into a better vehicle for commercial operators.

But that loss could be minor when compared with the prospect that the United States might now decide to exclude itself from a new global regulatory organization which may—sooner rather than later—count among its members all of our allies, the Third World and the socialist bloc. This new institution will safeguard the mining claims of our industrial competitors and reject rights claimed by American flag companies.

Moreover, if the United States stays out of the sea law treaty, and most major nations join it, we risk conflict over American assertions that we are entitled, without participating in the treaty, to rights embodied in the treaty related to navigational freedoms, exclusive economic zones, jurisdiction over our continental shelf, fisheries, pollution control and the conduct of marine scientific research.

Should all this come to pass—and it seems likely it will—we will suffer a significant, long-term foreign policy setback with grave implications for U.S. influence in global economic and political affairs.

The Law of the Sea Treaty has been under negotiation since 1966, when the United States and the U.S.S.R. agreed to consult all nations on the question of whether they would agree to a new global conference on the law of the sea. As initially envisaged, the aim of the conference would have been to fix the limit of the territorial sea at 12 miles and to provide for freedom of navigation through and over international straits which might be overlapped by the new 12-mile limit.

In 1968 the United Nations began to expand the as yet unwritten agenda of the Conference to include the issue of deep seabed mining in areas beyond national jurisdiction. By the time the Law of the Sea Conference was formally created in 1973, its agenda included essentially all uses of the oceans. Between 1973 and 1980 over 150 countries including the United States agreed on treaty texts on all but four points: boundary delimitation, which was settled in the summer of 1981; participation in the treaty by entities which are not sovereign states; the composition and

[1] Leigh S. Ratiner was Deputy Chairman of the U.S. Delegation to the final negotiating session of the Third United Nations Conference on the Law of the Sea, while on leave of absence from the Washington law firm of Dickstein, Shapiro & Morin in which he is a partner. He had served at the Law of the Sea Conference prior to 1977 in three previous Administrations, as a senior advisor and negotiator on seabed mining, energy and national security issues.

functions of the Preparatory Commission to set up the International Seabed Authority; and provisions for the protection of investment in deep seabed mining activities prior to entry into force of the treaty. After ten sessions of the Conference and 14 years of negotiating effort, the new Administration in Washington sought in the final Conference session this spring to renegotiate essential elements of a package that already commanded widespread support and near consensus.

How did this come about? In March 1981, the new Reagan Administration began a much-needed, soul-searching review of the draft convention on the law of the sea. It was clear that notwithstanding the treaty's many potential benefits, its deep seabed mining provisions were anathema to some elements of the Reagan Administration; moreover, the treaty was considered unratifiable in the Senate. The U.S. policy review lasted more than a year.

The policy review process, like many conducted through inter-agency groups regardless of which Administration may be in power, was essentially an adversarial process in which initially all documents were prepared for the purpose of reaching preconceived objectives and prejudicing an ultimate decision. Pressure from the White House to reach consensus was intense and this produced even further, and in some cases devastating, compromise formulations describing fundamental issues in dispute. (As a result, at least one crucial point was destined to be ignored in the final decision-making process because of its obscurity, obfuscation and ambiguity.) Every effort was made by the Assistant Secretary of State who was in charge of this review to conduct a neutral and balanced process. The fact that he failed in this mission is not a reflection on his capabilities but rather on the interminable capacity of bureaucrats familiar with the intricate detail and complexity of the treaty to spend enormous amounts of time in meetings which precluded the active participation of any responsible Assistant Secretary of State.

There were two general points of view which emerged in the review process. The first was advocated by the Deputy Assistant Secretary of State for Ocean and Fisheries Affairs, the most senior official responsible for the day-to-day conduct of the review. In essence, this point of view held that the treaty was flawed because it created adverse precedents for other negotiations on economic issues between developed and developing nations—the North-South dialogue—subjugated American industry to an international regulatory and management system, and was incompatible with President Reagan's apparent desire to return the United States to a period of power and influence in world affairs in which its policies would simply be enunciated rather than sold to others through a process of diplomacy and negotiation. I think it is also fair to say that proponents of this view did not believe that it was possible for any American to participate actively in the negotiation of this treaty without being seduced by it; therefore, they saw great risks in any return to the bargaining table even for the purpose of making a best effort. These views were strongly supported by staff on the domestic side of the White House, the Interior Department and some civilians in the defense establishment as well as some members of Congress.

The opposite point of view was represented by other agencies and participants in the process and by this author, who at the time was serving as a contract adviser to the Assistant Secretary of State, James L. Malone. That point of view can best be summarized as a recognition that the treaty in its present form was unratifiable, accompanied by a belief that the treaty could be renegotiated and that significant improvements could be made to it. From the perspective of those who held this point of view, there seemed no harm in trying to improve the treaty in fundamental ways, because ultimately a good treaty which provided universal recognition of mining claims as well as universal acceptance of countless other important legal principals contained in the treaty would be a worthwhile goal. Moreover, the proponents of this viewpoint felt that U.S. interests could not be compromised merely by returning to the negotiations, since the President ultimately would have to decide whether the United States should sign the resulting treaty.

Another point was made with respect to resuming negotiations: responsible American negotiators, acting under strict instructions, would not be lured into accepting a treaty which was contrary to the overall national interest. American negotiators at a multilateral conference generally do not operate in a vacuum or in secret. All of their tactical and strategic movements are discussed and debated on a daily basis with the wide array of U.S. interests represented on the U.S. delegation.[1]

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[1] In addition to government agencies, all of the representatives of the American ocean mining groups were invited to participate fully in the work of the delegation; special efforts were organized to obtain the views of companies not able to be in New York, in advance of the delegation accepting any compromises.

Opportunities for the loyal opposition to change the direction of the negotiations are legion. Therefore, the risk perceived by some of compromising national interests through an effort to renegotiate did not seem sufficiently realistic to sacrifice the opportunity to improve the treaty.

The latter view prevailed, and the President of the United States decided on January 29, 1982, that the United States would return to the negotiations and would seek six broad objectives. These objectives were then supplemented by detailed instructions, which were not sent to the President for approval but were negotiated among the various agencies of government which had participated in the initial process. Perhaps inevitably, the development of detailed instructions became a surrogate forum for rejoining the original issue which had already been decided by the President. The basic dispute over the instructions was whether to make them so strict and so confining as to produce a situation in which it would be impossible for American negotiators to satisfy them.

The instructions, when finally issued on March 8, long after the preliminary negotiations in New York had begun, reflected an interpretation of the President's objectives which was considerably more constrained than the objectives themselves. It is for this reason that many delegations at the Conference frequently found it difficult to understand the U.S. negotiating posture, since the President's public statement appeared to a reasonable reader to permit a far more flexible stance by the United States than was actually being presented. Other delegations did not understand that the U.S. delegation was operating under instructions containing a restrictive interpretation of the President's objectives and was under pressure to adhere to those instructions as the sole guidance for interpreting the objectives.

One final point should be made in connection with the policy review process which turned out to be of utmost importance in the end. Since one of the principal U.S. objectives was to secure access to the raw materials of the deep seabed, the question necessarily arose whether there was any alternative to a comprehensive treaty on the law of the sea which would adequately protect claimed mining rights so as to provide a stable basis for major financial commitments in support of deep seabed mining.

The proponents of withdrawal from the Conference argued forcefully that an alternative mini-treaty regime among the genuinely concerned industrialized countries—outside the framework of the comprehensive treaty—would be an adequate basis for investment even if a treaty on the law of the sea were adopted by a very large number of countries and entered into force. Those who favored returning to the bargaining table were divided on this issue. Some felt that under certain conditions a viable alternative mini-treaty regime could be established, but that the United States should nevertheless seek the comprehenisve treaty solution. Others felt that an alternative mini-treaty regime would be resisted by our Western allies in the face of a treaty adopted by the vast majority of nations, including virtually all of the developing countries. Moreover, if a comprehensive treaty on the law of the sea entered into force for 100 nations or more, it was felt that ultimately mining companies would choose that regime—which would give the best color of title to their mining claims—rather than a separate mini-treaty regime.

Because views were divided among those who supported returning to the bargaining table, doubts about the realistic prospects for establishing an alternative mini-treaty were not forcefully put forward at the highest levels of government, although the issue appeared in the relevant documents as one on which there was disagreement. Related arguments were presented to support particular points of view. As a result, to the best of my knowledge, no authoritative statement was ever made to the President and his close advisers that, if they wished to preserve direct access to strategic raw materials through American flag operations, there could in the end be no viable alternative to an improved comprehensive treaty on the law of the sea.

Accordingly, when a final decision was made and detailed instructions for the delegation were negotiated, there was an assumption in the Administration that if the United States adopted a tough uncompromising stance and as a result lost the opportunity to improve the treaty, it could afford to stay out of the treaty because there was a viable alternative—a separate mini-treaty with our allies. This assumption may have been the Achilles heel of the U.S. strategy for the last session of the Law of the Sea Conference. (Moreover, the strong U.S. public posture to push ahead with mini-treaty negotiations even before the Law of the Sea Conference began in March was a major factor in convincing the developing countries that the United States did not have a serious interest in the comprehensive treaty and thus worsened the chances for successfully negotiating the President's objectives.)

One further comment should be made in connection with the policy review process. The Department of Defense had in previous Administrations been a strong un-

yielding supporter of the successful conclusion of the treaty. It has always felt that the stability of international law which would accrue from this treaty, which contains many provisions favorable to the mobility of its air and sea forces, was a significant national security benefit when compared with the uncertainty of potential arguments with coastal states which might exist in the absence of this treaty.

During the Reagan Administration, however, two things changed in the Department of Defense. First, there was a much greater emphasis, particularly on the civilian side of the Department, on the importance of American access to strategic raw materials as a national security interest and, second, there was a belief that if the treaty entered into force without U.S. participation, most of those provisions which were favorable to the security of the United States would be accepted as customary international law, and that therefore the treaty rights would be available to all states whether or not they became parties to the treaty. In combination, these two views produced significantly less enthusiasm for the treaty within the Defense Department than had been the case before. This shift markedly changed the balance of power in the intragovernmental adversarial process. The assumption that the treaty provisions would become customary international law was never seriously questioned—it was taken for granted.

Out of respect for our power and influence, the world waited for the U.S. decision. The Law of the Sea Conference went into neutral gear, avoiding final adoption of the text which had been virtually completed in 1980 with apparent U.S. agreement. By the time President Reagan announced on January 29 that the United States would return to the negotiating table, U.S. negotiating leverage was substantial.

When the Conference resumed in March, the United States had its golden opportunity. The rest of the world was ready, willing and anxious to reshape important aspects of the treaty to attract U.S. support. Yet at the end, as has already been mentioned, the treaty was adopted over U.S. objections. The Soviet bloc abstention was prompted by a minor point, and the Soviets are likely eventually to sign the treaty. Two of America's closest allies, Japan and France, despite high-level pleas for solidarity, voted in favor—a startling and potentially powerful signal about Japanese postwar foreign policy development. West Germany, Britian and a handful of other Western allies abstained in support of the United States—but may well sign the treaty with or without the United States, for reasons which will be discussed later.

As described above, the United States returned to the bargaining table with instructions to fix every important defect in the seabed mining provisions—in short to convert the treaty into a "frontier mining code" in which the first company to stake a claim owns the resources and is not subjected to regulation or management except for the payment of taxes. This view was combined with a demand for overwhelming voting power for the United States and its closest allies in the proposed International Seabed Authority.

All of the improvements we sought were desirable and important. Some of them were fundamental to making the treaty commercially more workable. But the primary U.S. objective, in fact, was the eradication of ideological impurity. As a result, when the time came for compromise, the United States did not make ideological concessions to the Third World in exchange for pragmatic improvements. The Western allies maintained solidarity with the United States throughout the negotiations. In doing so, our allies, who in varying degrees share our ideological views—but not our willingness to sacrifice concrete accomplishments for them—were deterred from negotiating more modest improvements on their own behalf.

Our strong stance on every issue (combined with public posturing in favor of an urgent separate mini-treaty) persuaded the bulk of Conference participants that the U.S. appetite was too great—no improvements were likely to satisfy us that could also be swallowed by the Third World. Many hoped up until the final hours that the United States would moderate its position on other issues, so as to create a fruitful negotiating climate. We did finally, but our concessions were small when measured against our remaining demands. Indeed, even the few concessions we offered brought cries of sellout from some in Congress, the mining industry, and elements of the Executive Branch.

The day-to-day negotiating process was monitored both within the delegation and back in Washington so closely by individuals who had supported the option of withdrawal from the Conference, that any negotiating move made by the American delegation was interpreted as a giant step down the slippery slope to compromise of principle and disaster. One of the individuals who held this view even believed that efforts at compromise which might ultimately fail and cause the United States to stay outside the treaty were in and of themselves dangerous precedents for other global negotiations. This particular individual alerted members of private industry

(who also shared this perspective) to all U.S. delegation activities including new or contemplated U.S. proposals. Thus for every effort by the American delegation to find an accommodation that would satisfy the President's objectives, there was a countereffort launched in Washington by those who had lost the battle to withdraw from the negotiations. These countermoves were executed as personal attacks on members of the American delegation, and as attacks on the process of negotiation itself, and were frequently marked by distortion and falsehood. The American delegation, meanwhile, was engaged in round-the-clock negotiations in New York and could not devote substantial attention to defending and explaining its actions in the face of increasing opposition in Washington which succeeded in obtaining a hearing at very high levels in the White House.

The American delegation was, therefore, held in check and did not make serious compromise proposals on many issues where genuine compromise might have produced far-reaching improvements in the treaty text. I would cite two examples: if the United States had not demanded virtually autocratic ruling powers over the Seabed Authority and had not sought the total elimination of the so-called production ceiling (which in real economic terms is a cosmetic provision to reassure existing land producers of seabed metals that their production will not be wiped out by future seabed production), it would have been possible, perhaps easy, to have obtained major improvements in the practical effects of, and the principles contained in, the technology transfer provisions and the provisions which permit amendments to the treaty (after 20 years) without U.S. consent. When the U.S. position did reflect modest relaxation in some of these areas, the negotiators came very close to solutions for these latter two problems.

It should be borne in mind that those who did not want the United States to participate in the Conference may also have had as their underlying tactical objective a desire to ensure that the treaty was not improved, so as to make it more difficult for our Western allies to join the treaty and concomitantly to make it easier when the Conference ended in failure to obtain rapid agreement to an alternate mini-treaty regime.

The developing countries, however, sensed that these dynamics might be in the process and virtually demanded an opportunity to negotiate the one issue on which they were prepared to make a concession so significant as to lure our allies into the treaty. Paralyzed by the rigidity of its instructions, the American Delegation had no choice but to play into the hands of the Third World strategy and negotiate the issue which the developing countries insisted be taken up first—the recognition of rights for mining companies who had already made investments in the seabed—"grandfather rights."

This was so because the issue of grandfather rights was considered by the entire Conference to be "outstanding" in that it had never been part of the 1980 package negotiated by Ambassador Elliot Richardson. Moreover, it was an issue on which significant progress could be made, while the issues the United States wished to renegotiate were among the most difficult. The developing countries hoped that if they made meaningful concessions on grandfather rights the U.S. mining industry would be pacified and would reduce its pressure on the U.S. government. In turn, they assumed the United States would reduce its demands.

The negotiations on the issue of grandfather rights resulted in a final Conference Resolution which successfully met some of our fundamental objectives—but more importantly may well have met the most central objective held by our closest allies. Under the Resolution, four existing mining consortia (each of which includes or is controlled by U.S. companies) plus projects sponsored by the governments of Japan, France, the U.S.S.R. and India, would have guaranteed automatic access to the strategic raw materials of the seabed for the first generation of seabed mining. Altogether, ten seabed mining entities are entitled to all of the mineral production likely or possible from the seabed for the next 30 to 50 years: metal market projections indicate that demand for maganese, copper, cobalt and nickel from the seabed is unlikely to reach, much less exceed, the production capacity of these grandfathered miners during that period.

Thus—with the notable exceptions of mandatory technology transfer and the procedure for amending the treaty—the offensive ideological provisions of the treaty would not effectively apply before the middle of the twenty-first century. By that time there would have been a thorough treaty review and an opportunity to renegotiate.

Because the issue of grandfather rights dominated the negotiations, and because the negotiations were up against a deadline of April 30 (a consensus decision accepted by the Reagan Administration in 1981), opportunities to deal with issues other than grandfather rights did not arise until the final ten days of the session. More-

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over, the procedure for the final session of the Conference was organized in such a way that between April 13 and April 30 the only amendments to the treaty which would have any chance of inclusion in the final draft would be those put forward by the president of the Conference, Ambassador T. T. B. Koh of Singapore, if he were satisfied that such amendments adequately enhanced the prospect for consensus.

Thus for a little over two weeks the president of the Conference held enormous power over the final treaty text. At the same time, it was his responsibility, and to his credit he took it seriously, to introduce amendments to the treaty only if they enhanced the prospects for consensus. He organized small groups for rapid, effective negotiations on other issues.

However, the atmosphere in this final stage was undoubtedly affected by an important exchange earlier in the Conference. Ambassador Koh had hoped that a set of proposed amendments put forward very early in the negotiations by a group of so-called "good samaritans" [2] would bridge the gap between the developing countries, on the one hand, and the United States and its Western allies on the other. He wanted both sides to accept these proposals—or at least not to reject them—so that at the end of the Conference he would be in a position to propose them for incorporation into the final treaty text. For the United States, these papers moved significantly toward meeting the President's publicly announced objectives, although they fell far short of the American delegation's negotiating instructions. Verbatim acceptance of the good samaritan papers would have produced a treaty which on a fair reading of the President's objectives of January 29 would still have fallen short.

The crucial question was whether the United States was willing to send a strong signal that by and large these papers were on the right track, and with further negotiations and additional amendments might be acceptable. While the United States did not intend to reject these proposals out of hand, it stated its difficulties with these proposals in such strong terms as to lead Conference leaders to conclude that they had been rejected. In the vocabulary of diplomats, strong reservations to a proposal are generally considered to be a rejection. Thus, at a crucial halfway point in the Conference there may have been a tragic failure of communication.

After the United States apparently rejected the good samaritan papers as a basis for negotiations, the remaining weeks of negotiation were carried out by the president of the Conference in a desultory and pessimistic atmosphere, even though time permitted serious negotiation of the main issue of concern to the United States. Although the Group of 77 was maintaining a very tough posture in response to the U.S. stance, the job could have been done. But in an atmosphere where hope and optimism were lacking and U.S. commitment to the negotiation was doubted, it became virtually impossible for the president to pull a rabbit out of a hat.

He did, nevertheless, finally make a number of additional improvements to the treaty as a result of direct negotiations between the Western countries and the developing countries. For example, the United States is guaranteed a seat on the Executive Council of the new global institution, the Seabed Authority (assuming, of course, that the United States joins the treaty). The provisions for amending the seabed mining provisions of the treaty have been improved. The contract approval system for mining entities has less potential for abuse and discretion. The policy orientation of the Seabed Authority is slightly more favorable to mineral production, and the Seabed Authority must adopt rules and regulations for newly discovered seabed minerals once a nation is capable of exploiting them makes a request—thus avoiding one of the five fatal flaws in the previous draft treaty, a moratorium on these other minerals.

These achievements were modest, however, and did not rectify fundamental inequities and adverse precedents which the Administration quite properly opposed. Nevertheless, they may be sufficient to make the treaty very attractive to other Western industrialized countries who, while sharing our ideological views, are more interested in assured access to strategic raw materials and influence in global economic decision-making. Under the treaty, they will be guaranteed mineral access for a substantial period into the future and will play a large role in shaping the rules for seabed mining.

Perhaps the greatest irony for the United States is that, as a result of one further change in the last stages of the Conference, the treaty now authorizes, even commands, what the Third World had long vehemently opposed—a mini-treaty among those countries that wish immediately to resolve overlapping mine site claims and

[2] Canada, Australia, New Zealand, Norway, Sweden, Denmark, Finland, Iceland, The Netherlands, Ireland, Switzerland and Austria.

obtain global approval for their legal rights. But there is a catch. To obtain global approval, they must sign the treaty.

If nations fail to sign, and instead sign an *alternative* mini-treaty regime, they will provoke global disapproval of the lawfulness of their mining claims. The President of the Conference has vowed to challenge any alternative mini-treaty before the U.N. General Assembly and to seek an opinion of the International Court of Justice. The resulting protracted litigation would have a chilling effect on seabed mineral investment.

For this reason among others, in my judgment Japan, France, West Germany, Britain and most other potential seabed mining nations ultimately will sign the Law of the Sea Treaty and a mini-treaty *among themselves* which will dovetail with the treaty. In any event, our allies will surely make certain that any such mini-treaty preserves their option to sign the Law of the Sea Treaty. They will do so because the Law of the Sea Treaty creates unchallengeable rights, superior to those created by a mini-treaty. Absent U.S. ability to persuade our allies to sign a permanent mini-treaty as an alternative to the treaty, the United States ultimately will be abandoned by its allies, who would be prohibited from recognizing U.S. mine site claims once they have signed the treaty.[3]

This point is crucial, because I believe the U.S. decision not to compromise ideological issues was founded on an assumption that after the Conference ended, the Western industrialized countries would ignore the Law of the Sea Treaty and set up an alternate mini-treaty. This approach presumably assumed that a mini-treaty would include all potential seabed mining countries and therefore would provide sufficient legal security to attract the billions of dollars of private capital necessary to set up commercial mining operations. I suspect that if William Safire had understood that this outcome was, at best, improbable and unworkable, he would not have suggested in *The New York Times* on April 9, 1982, that the United States should shelve the treaty negotiations. I believe that if President Reagan understood the realistic prospects for an alternative mini-treaty regime, he too would have had second thoughts about the pursuit of principle over pragmatism.

U.S. policymakers may have also made another assumption which could prove dangerously false: that the United States could stay outside the treaty but claim and enjoy its numerous beneficial provisions (which, among other things, establish rights to the 200-mile economic zone, guarantee to every coastal state broad jurisdiction over its continental shelf, and provide for freedom of military and commercial navigation within the economic zone and through and over international straits)[4] and that these claimed benefits would be accepted by other nations because the treaty reflects custom—an accepted way of formulating international law.

I do not believe that serious consideration was given to the possibility that the contrary argument could be made—that the Law of the Sea Treaty only creates rights for those who are parties to it and who assume the treaty's obligations. Let us look at just a few examples.

The Strait of Gibraltar is critical to the passage of surface and submerged vessels and to overflight by aircraft of the United States. Spain, which is the relevant coastal sovereign, might argue that the 12-mile territorial sea has become part of customary law (a view very widely held in the world community). At the same time, Spain might argue that the regime of enlarged "transit passage" through international straits is new to international law—that it is found only in the Law of the Sea Treaty and is thus a contract among the parties to it. Thus Spain would argue that the old rule permitting only "innocent passage" in the territorial sea would apply—which prohibits submerged navigation. This is not the time or place to attempt to

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[3] Article 137, paragraph 3, of the treaty prohibits states from recognizing seabed mining claims which are not derived from the treaty and its rules and regulations. Under customary international law principles of treaty interpretation, a state which signs a treaty is bound not to act incompatibly with it pending its ratification and entry into force.

[4] In addition, coastal state rights to control offshore pollution as well as shipping state rights within coastal waters are covered by the treaty. Similarly the rights of marine scientific researchers and coastal states are set forth in the treaty. Space does not permit an exhaustive listing of the hundreds of legal rights and obligations which create the overall balance of sea law in the treaty. Suffice it to say that virtually all uses of the oceans are affected by the legal rights and obligations set out therein.

Editor's Note: The many issues considered by the Third Law of the Sea Conference have been the subject of a number of articles in *Foreign Affairs* from varied standpoints. See, most recently, Elliot L. Richardson, "Power, Mobility and the Law of the Sea," Spring 1980, pp. 902–919; Richard G. Darman, "The Law of the Sea: Rethinking U.S. Interests," January 1978, pp. 373–395; Jonathan I. Charney, "Law of the Sea: Breaking the Deadlock," April 1977, pp. 598–627; John Temple Swing, "Who Will Own The Oceans?", April 1976, pp. 527–546.

prejudge the outcome of such an argument. What is dangerous for the United States is the existence of the argument and the potential uncertainty of its military rights in narrow seas during times of crisis.

A second example could be that coastal states may choose to impose stricter regulations on oil tankers flying a U.S. flag, arguing that they have a right to discriminate against non-parties to the treaty. Third, in a Middle East crisis Arab countries might be tempted to seize on U.S. non-participation in the treaty as an excuse to attempt to limit our activities within their economic zones.

Thus, for those nations who eschew the treaty obligations, while treaty rights may be claimed as a matter of customary law, they may also be contested (even by obstructive action) and in any case challenged in protracted litigation before the International Court of Justice. That Court may one day resolve America's rights to freedom of navigation, with the possibility that the successful ten-year negotiating effort to gain these rights could conceivably be lost in a single court decision.

One final point remains. The totality of the seabed mining provisions of the treaty are hard to defend on the merits. I am a conservative who sympathizes with the Reagan Administration's criticisms of the Law of the Sea Treaty. Presumably that is why the Reagan Administration asked me to join the effort at renegotiation. While I am certain that the final treaty would have better satisfied U.S. interests had the Administration been less ideologically rigid in its approach, I also would be the first to acknowledge that the best that could have been done would have involved important compromises of principle.

But the dilemma for the United States now goes far beyond the specific flaws in this treaty. In time—probably sooner rather than later—our allies, the Soviet bloc and the Third World will sign and ratify the treaty. They see a long-term future in the treaty, and they will want to be part of it. They will want to protect "grandfather rights" for their companies, secure international approval for broad jurisdiction over their continental shelves, have a voice in organizing, staffing and drafting the rules of the new Seabed Authority, and lay to rest numerous other potential disputes about varying uses of ocean space and resources.

If the Western industrialized powers, minus the United States, join the Soviet bloc and the Third World, they will create an historic global organization—one which for the first time regulates, manages and produces globally shared resources. One day this institution could use its taxing power to become self-financing. Should all this occur without American influence, participation and leadership, our nation will suffer a much more serious adverse precedent than any of the adverse precedents we fought against in the treaty negotiation itself. We will stand as the emperor without clothes—for the entire world will see that it can do amazing and stupendous things without American money, leadership or technology. If the United States is not part of the treaty system, American companies will have to go to other countries to be able to conduct business in the seabed. As a result, the United States will lose direct access to strategic raw materials from the seabed, a goal it has sought consistently throughout the ten-year law of the sea negotiations.

In short, the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Conference, but the United States may lose a very important war.

If one accepts the thesis that our Western allies will join the Law of the Sea Treaty and refuse to create a mini-treaty with us; that our companies will flee to other flags so as to operate under the treaty and gain universal acceptance of their mining claims; and that vitally important freedoms of the seas will now be subject to legal argument and potentially will be decided by the International Court of Justice adversely to our interests, then the United States is compelled to examine any remaining option to improve the treaty and sign it, and should not simply walk away from the treaty in the misguided hope that it will evaporate.

In September 1982 the Law of the Sea Conference will convene in New York to approve the final recommendations of its drafting committee. If the United States were willing to mount a major diplomatic initiative between now and then to obtain consensus approval for a few amendments relating to discrete issues—such as the process for amending the treaty, the mandatory transfer of private technology, and clearer provisions for the separation of powers between the one-nation, one-vote Assembly and the Executive Council (on which we now have a guaranteed seat)—I believe there is a chance for success, and I also believe there would be a good chance to persuade the Senate to advise and consent to the treaty.

This approach is conditioned on the proposition that during the same time period the wider business community—not just a handful of mining companies, but scores of American corporations with far-flung global interests and a direct concern with

the risks presented by isolationism and worsening U.S. relations with the Third World—will enter this policy debate and make their views known forcefully.

In a recent appearance before the Association of the Bar of the City of New York, the President of the Conference, in response to a question whether additional amendments would be admitted in September, replied that he was a "servant of the Conference" and would, of course, not impede a consensus decision to make further amendments.

In any event the United States should avoid premature breaking of ties with the Conference. We should attend the drafting committee meeting this summer (where incidentally the United States serves as Chairman of the English Language Group), we should attend the signing session in Caracas in December 1982 and we should sign the final act of the Conference, a step which has no legal significance except that it gives us the right to attend the Preparatory Commission as observers when it writes the rules and regulations of the new global Seabed Authority.

If, finally, the President decides that the United States should not sign the treaty after making one last effort to improve those of its provisions which are true impediments to its ratification—so be it. But my prediction is that eventually a future U.S. President will sign it, and its content will be worse than if we had compromised a little now on principle to gain additional benefits.

If my political analysis is correct, this or some future Administration will come to understand that the costs of isolation are far higher than the costs of accepting some of the rhetoric and principles of the North-South dialogue. And when the United States does eventually join, the rules of the game will already be set and our industrial competitors will be operating in the seabed and will have gained by then major political and economic advantages in the work of the new institution.

Our senior foreign policy makers should understand that once leadership is abdicated and the world finds that it can proceed without us, it will not be easy for the United States to reclaim its influence.

[From Fortune, Aug. 23, 1982]

THE REAGANITES' MISADVENTURE AT SEA

TREATIES

(By Tom Alexander)

Several American companies have been captivated for years now by the lure of manganese nodules—those black, potato-shaped, metal-rich objects that litter some mid-ocean floors. These companies have spent around $350 million prospecting the seas and developing the impressive equipment required to raise the nodules and process them into refined metals. But as a result of recent decisions by the U.S. government, it is likely that when nodule harvesting eventually starts, the companies doing it won't be American. The U.S. outfits will probably have either fled to foreign shores or sold off their technology and dropped the mining idea entirely.

What's oddest about this imminent demise of American-flag ocean mining is that it amounts to a complex form of corporate suicide. Climaxing a long and successful lobbying campaign by the industry and its supporters in government, the Reagan Administration recently announced that it won't sign the international Law of the Sea Treaty, which has been under negotiation for 14 years. That pretty much sank any prospects that U.S. companies will be able to mine nodules in international waters.

In the short run, it's true, the dissolution of U.S. ocean mining is no big deal. Given the high cost of operations and the current dismal market for metals, nodules gathering may not prove profitable for decades. But the Administration's decision threatens more immediate national interests, notably freedom of navigation for ships and aircraft and political and commercial relations with the world at large. In the longer run it may impede U.S. access to strategic metals.

Were the implications less disquieting, the affair would be notable mainly for its quality of farce. For the U.S. was a prime instigator of the Law of the Sea Treaty—now widely referred to as LOST. What's more, the treaty accomplished practically everything the U.S. had hoped it would. But by withdrawing, the U.S. may deny itself the benefits. The turnabout on the treaty also reinforces the country's international reputation for inconstancy and unreliability.

WALLS IN THE OCEAN

The American interest in securing a treaty on maritime law dates back to the 1950s and the emerging problem of "creeping jurisdiction"—coastal nations extending their seaward boundaries beyond the traditional three-mile limit. Many countries began adopting 12-mile limits; several Latin American countries claimed 200 miles. In the face of these claims, U.S. defense planners—and their counterparts in the Soviet Union—wanted to pin down their rights to navigate freely. Widely adopted and strictly exercised, the extended jurisdiction could close some 116 international straits to shipping and large expanses of ocean to aircraft. As it was, some countries were demanding that foreign warships provide 24-hour notice before entering their new territorial waters and that nuclear submarines passing through straits—perhaps on their way to secret stations—travel on the surface.

Looking for ways to induce other countries to guarantee unimpeded navigation, the U.S. hit on the idea of bringing in marine natural resources—notably manganese nodules. Oceanographic research had revealed the abundance of the nodules, particularly the rich deposits in the international waters of the eastern Pacific. In the Sixties, enthusiastic scientists and would-be mining entrepreneurs portrayed those seafloors as being paved with trillion of dollars' worth of fairly high-grade sources of manganese, copper, nickel, and cobalt. Metal prices were high and climbing; grades of ores from onshore mines were declining. U.S. companies—familiar corporate names such as Kennecott and Lockheed and less familiar ones such as Sedco and Deepsea Ventures—surveyed prospective seabed claims and developed techniques for lifting nodules from their three-mile-deep resting places and refining them. To help raise capital and spread financial and political risk, the companies adquired partners abroad.

THE 77 SAW AN OPPORTUNITY

At first everyone presumed that the nodules fell under the centuries-old doctrine of freedom of the seas—that, like fish, they were free for the taking. But in 1966, President Johnson, in a burst of 1960s-styly openhandedness and sentimentality, characterized the nodules as belonging to all nations. In 1970 the U.N. declared them to be the "common heritage of mankind"—L.B.J.'s very words. The U.S. voted in favor of the declaration. A clause in it said that no country could exercise rights over the international seabed except in accordance with a new treaty.

In authorizing the U.S. vote, President Nixon saw the proposed treaty as an opportunity to obtain worldwide agreements to keep straits open, assure U.S. rights of navigation and marine research within 200-mile waters, provide mechanisms for settling disputes, and resolve other troublesome issues associated with the oceans.

These expectations failed to anticipate torpedoes from two directions. At the U.N., the newly militant Third World voting bloc known as the Group of 77 saw law-of-the-sea negotiations as an opportunity to advance its New International Economic Order, aimed at obtaining a more equal distribution of the world's wealth. The Group of 77 drove a hard bargain on seabed mining. Among other things, it insisted that all mining be carried out under contract to an International Seabed Authority, which would divert part of the profits to the Third World. Some members of the Group of 77, joined by some developed mining countries like Canada, Australia, and New Zealand, also demanded limits on seabed production to protect their metal prices.

The other main source of trouble was the embryonic U.S. ocean-mining industry itself. It did not care for Nixon's scheme, and its friends in Congress strongly opposed the Group of 77's demands.

VERGING ON THE BIZARRE

Deadlocked over seabed mining, the treaty negotiations dragged out until 1976, when Secretary of State Henry Kissinger put forward a package of compromises, which were adopted. He proposed a dual system that would allow mining both by private operators and by an internationally owned entity, which came to be referred to as the Enterprise. Kissinger suggested that the Enterprise might get help from its private competitors—not only capital but also access to proprietary mining and processing technology. One provision carried international generosity to an almost bizarre extreme: before a private company could obtain a permit to mine a new seabed site, it would first have to prospect two sites, and then the Enterprise would be allowed to pick the one it wanted.

By 1980 it finally looked as though a treaty was within reach, a treaty that would effect many changes in international law. It would grant coastal nations 12-mile ter-

ritorial seas plus the rights to natural resources in a 200-mile "economic zone." But it would also guarantee freedom of passage for ships and aircraft of signatory nations. It would establish standards covering marine pollution and set up an international tribunal to resolve disputes. A final conference to iron out a few remaining differences was scheduled for the spring of 1981.

WASHED-AWAY MEMORY

Then Reagan was elected. The new Administration paid little attention to the formidably complex sea-law issues until shortly before the final session was to begin, two months after Reagan took office. By that time, government had little institutional memory about such issues as navigation, which had prompted the U.S. to initiate the LOST process to begin with. Instead the Defense Department suddenly became preoccupied with strategic metals, notably manganese and cobalt, which the U.S. imports largely from Communist or unstable Third World countries. And the Administration became preoccupied with questions of precedent and free-enterprise ideology

A few days before the conference the Administration abruptly fired the old Carter delegation's leaders and demanded a year's delay in the negotiations while it studied the whole treaty with a fresh team. The year-long study turned into a bitter and confused affair. Badly divided, the various government agencies argued their narrow concerns with little regard for the overall package of U.S. maritime interests. Many of the bureaucrats most knowledgeable about the history of LOST were either transferred or intimidated into silence. Some of them contend that middle-level political appointees deliberately kept their Cabinet and White House superiors in the dark about the complex web of U.S. interests and options.

The intellectual vacuum was filled by lobbyists from the mining companies and by people like Secretary of the Interior James Watt and Theodore Kronmiller, a deputy assistant secretary at State, who were outraged by the thought that private U.S. enterprises would put up the capitol and take the risks for the benefit of a centrally planned international regime. Some of the Third World's other demands seemed designated to inflame this relation—the insistence, for example, that part of the seabed-mining proceeds should go to movements like the Palestine Liberation Organization.

Some of those involved in the U.S. deliberations say that Kronmiller and others really sought to sabotage the LOST negotiations by imposing demands they were fairly sure the other side would never accept. For instance, they demanded that ceilings on seabed production be eliminated, even though the ceilings actually negotiated appear to be so liberal as to have no practical effect.

More moderate members of the U.S. delegation, including the chief negotiator, Washington lawyer Leigh Ratiner, agreed that some of the treaty's features were unacceptable. These included the absence of guarantees that the international seabed authority would actually authorize a private company to mine once it had spent, say, $200 million on exploration and equipment. The moderates also objected to a provision for a future review conference, in which arduously negotiated compromises might be changed by a vote of the member nations. And they didn't like the requirement that mining companies sell their technology to the Enterprise.

Ratiner probably knows more about the law of the sea and Third World attitudes toward it than anybody else in the U.S., having spent some 16 years as a government sea-law functionary, chief negotiator in several sessions, and lobbyist for Kennecott and various other outfits interested in ocean industries. From that seasoned perspective, he believes that all the substantive objections could have been removed in the recent negotiations. Agreeing with that estimate is Elliot Richardson, who headed the U.S. law-of-the-sea delegation in the Carter Administration. Ratiner contends that the U.S. negotiating position was undermined by the hardliners' rigid and unrealistic demands, which convinced the Group of 77 that the U.S. wasn't negotiating in good faith.

This conviction was bolstered by a strategy the U.S. delegation has been energetically pursuing: an attempt to persuade other Western countries and Japan to join the U.S. in a "reciprocating states agreement" or "mini-treaty" independent of LOST. Each country would pledge to recognize the mining rights and claims of all the others. The U.S. hoped that by the sheer weight of economic power represented in the mini-treaty it could prevent the maxi-treaty from supplanting the freedom-of-the-seas principle in international law.

Unfortunately the scheme probably won't succeed. Given the choice between joining a legally dubious mini-treaty to mine an economically marginal resource and joining a maxi-treaty with multiple benefits, the other industrial countries seem to

prefer the latter. For one thing, most of them are more sensitive than the U.S. to trade relations and goodwill in the Third World. In April, to be sure, several of these countries abstained on a vote to adopt a treaty draft, but odds are that most will eventually ratify the treaty.

The Group of 77 cleverly helped spike the mini-treaty scheme this spring by sweetening the mining provisions. In effect, they agreed to create for the first generation of mining consortia a worldwide cartel guaranteeing them exclusive access to the seabed for 30 to 50 years, while protecting prices by controlling production. This "prior investment protection" clause for miners has driven a wedge between the U.S. and its allies. Moreover, it will probably either break up the mining consortia or cause their American participants to move abroad. The American companies have acquired connections with sophisticated foreign outfits, including oil companies, which not only tend to be tolerant of such arrangements but also have larger interests to protect. (See box, page 134.)

A SORT OF SMORGASBORD

Despite the Administration's recent denouncement of LOST, based on its mining provisions, the U.S. is still trying to keep a hand in the proceedings that deal with navigation and the scores of other provisions that it would like to see become international law. The delegates are scheduled to meet in Caracas in December to sign the "final act," one step short of the actual treaty. Some officials say the U.S. plans to sign this non-binding document, which will permit it to participate as an observer in some of the technical sessions dealing with various issues. But the U.S. says it will not participate in the seabed-mining sessions, nor sign the treaty when it is ready in January. In effect, the Administration seems to regard the treaty not as a give-and-take bargain but as a smorgasbord from which it can pick items it likes.

Some American mining companies and their supporters in government claim, for example, that seabed mining is still covered by the doctrine of freedom of the seas. But the U.S. itself acknowledged doubts about that doctrine years ago when it induced the rest of the world to sit down and clarify the matter. LOST is the outcome of that process, and it will soon become part of international law. It will, among other things, deny a go-it-alone miner's right to stake out a seabed-mining claim. And without a widely recognized claim, no company can prudently invest the kind of money it will take to harvest manganese nodules. Surveys by the General Accounting Office and the Department of Commerce support the unsurprising conclusion that banks will not lend the $1.2 billion or more required to equip a mining venture when the claim is disputed. So for all their free-enterprise rhetoric, some of the companies have been counting on the U.S. government to subsidize them or insure them against the risk of mining outside the treaty. Few Washington observers give those hopes much chance.

At any rate, government's preoccupation with the mining issues in LOST seems misplaced. Based on current metal prices and anticipated mining costs, an MIT model projects a rate of return to mining companies of only 9.5 percent—too low to trigger investment. Someday, no doubt, as onshore mines are depleted, seabed mining will make economic sense. Depending on whose projections you believe, that could be anywhere from ten to about 25 years from now. Whenever the time comes, mining outside the treaty will be riskier than mining within it.

WHALES, FOR EXAMPLE

Right now, nobody in authority in Washington seems to have any clear ideas about what the U.S. should do that doesn't sacrifice the very benefits the U.S. originally sought to preserve. The Administration has been preoccupied with the precedents the treaty would establish, such as the "common heritage" and seabed-authority concepts, which they hold to be antithetical to American concepts of private property and of rewarding those who make efforts and take risks. But it's hard to find much practical substance in these concerns. As for precedents, U.S. governments and corporations have long dealt with all kinds of alien, sometimes absurd, regimes and institutions. And there's nothing novel about international regulation of common resources. Radio frequencies are one example. Whales are another.

Something else that bothered the Administration about the treaty was the application of the one-nation, one-vote principle to control of seabed resources. Opponents of the treaty feared that the huge voting majorities of the Communist and Third World countries might swamp Western interests. Initially, changes could be made only by unanimous consent. But 20 years after mining starts, changes could be imposed by three-quarters of the countries voting. Like the other Administration fears,

this one appears to be exaggerated. At the very worst, the U.S. could always withdraw from the treaty.

Some oil company representatives and others in the mining consortia privately acknowledge that the treaty isn't all that bad compared with many business deals in the Third World. "A good thing about the treaty," one man observes, "is that if the seabed authority tries to screw you, it's not just an expropriation, it's a treaty violation."

The fees and taxes to be paid to the authority are comparable to those some countries impose on mining enterprises ashore. And given the nation's interest in access to strategic materials, there is a fair likelihood that the federal government would credit the imposts against U.S. taxes, as is usually the case with foreign taxes now. Moreover, an analysis by the Bureau of Mines discounts the seriousness of the technology-transfer provisions. A company has to transfer only technology that the Enterprise can't find anywhere else, and the bureau says there are at least four manufacturers for every component of seabed-mining hardware. In any case, the Enterprise would have to pay a fair price, arrived at by commercial arbitration. Finally, the treaty's prior-investment-protection clause, with its cartel-like protections against new entrants and overproduction, would make life more relaxed for the companies that qualify—though that, to be sure, would not necessarily serve the public interest.

As matters are shaping up, the question of whether seabed mining—when it eventually comes about—will be a good deal under LOST scarcely matters since no American company is likely to mine outside the treaty anyway. What matters more is the cost to the U.S. of going its own way. It could be argued that the U.S. would be better off if there were no LOST at all. But that option doesn't exist. Whether the U.S. ratifies or not, the treaty will come into force one year after at least 60 countries ratify, possibly as soon as 1984.

HERE COME THE GUNBOATS

The LOST process has already begun to affect the behavior of coastal nations. Unlike national law, international law has traditionally been determined primarily by custom. LOST amounts to an explicit program to fix law by international agreement instead, but custom—that is, what countries are allowed to get away with—will continue to exert a shaping force on the treaty's actual effects. Since the treaty amounts to a delicate bargain between countries with widely diverse interests, adherents will have an incentive to prevent other countries from getting away with much.

An analogous instance was the U.S. challenge last year to Libya's unilateral claims in the Gulf of Sidra, a challenge that took the form of downing two Libyan fighter planes. It's conceivable that some countries will be prepared to challenge any unilateral moves by non-signatories to mine oceans or even to traverse straits. Some states, Indonesia, Malaysia, Algeria, and Morocco among them, are already arming themselves with Exocet missiles, torpedoes, and gunboats to enforce the sovereignty authorized by LOST. Retaliatory expropriation or sabotage of American commercial interests abroad cannot be ruled out.

But even these consequences of the Reagan policy are less disquieting than the habits of mind it represents. It's the kind of policy that incurs considerable costs but no commensurate gains, that is better suited to raising ideological ferver in think tanks than to furthering national interests—the kind of policy that was a trademark of the Carter Administration in its worst days.

Senator PELL. The record should also show the answer to the question regarding the area about where there can be no emplacement of nuclear weapons on the seabed floor, that it would be outside the 12-mile territorial limit, so a nation if it wished to could emplant nuclear weapons on the seabed floor within the 12-mile territorial limit. The record of this hearing should so show.

I gather also from what Mr. Ratiner said that his recollection likewise was that the seat on the council was going to be based on value and not quantity, and since he was the principal negotiator at the conference, I would hope that that would settle the matter, and that there need be no further discussion. Would Mr. Kronmiller agree?

Mr. KRONMILLER. Senator, no, I would not agree with that. I think, irrespective of what the position of one individual might have been, though he might have been by his own account principal negotiator, that is not dispositive of the issue so far as the U.S. delegation as a whole is concerned. Our delegation, moreover, has on frequent occasions taken positions concerning certain interpretations of text, and we have found the majority of the Conference has taken a completely contrary view.

Senator PELL. Would you be kind enough to submit a memorandum to the subcommittee which expresses the grounds of your individual views, and then the reader will have to make his own interpretation.

[The material referred to follows:]

[SUBMITTED BY THE DEPARTMENT OF STATE]

The United States had noted at the Third United Nations Conference on the Law of the Sea over the last several years the basic inequities of specifically guaranteeing three seats to the Eastern European bloc led by the Soviet Union, while having no such guarantees for the United States and its allies. Privately, many of the important Conference leaders acknowledged that this was unfair, but asserted that little or nothing could be done about it.

In response to U.S. objections to this inequity in the text, at the last session it was agreed that the phrase, "as well as the largest consumers" would be added to Article 161(1)(a). We were told privately that this was intended to guarantee the United States a seat on the Council. However, unlike the guarantee for the Eastern bloc, this language does not identify any country as the largest consumer. Neither was it made clear how these terms would be defined.

Finally, it should be recognized that the manner in which the Rules, Regulations, and Procedures of the Seabed Authority would define this and other relevant terms in the text would be critical in determining the categories from which Council members would be chosen. This would include the four members chosen on the basis of consumption, the four chosen on the basis of production, and the four chosen on the basis of investment in seabed mining. If, for example, tonnage were chosen as the criteria for determining the largest consumer, the composition of the Council could be different from composition were the criteria based on the value of the metals produced. Another open question would be how tonnages or values for the metals would be aggregated. No one can now say with certainty what the Preparatory Commission of the International Seabed Authority will decide on these issues.

Senator PELL. Mr. Welling, I was very interested in some of your remarks, and in this regard would you consider the possibility ever that Lockheed would mine under the flag of a nation which should become a party to the treaty? If you find there is just too much insecurity of doing it on our own, would you adopt a flag of convenience, maybe not Liberian or Panama, but whatever convenient nation it might be?

Mr. WELLING. Senator Pell, I can say unequivocally that we would not proceed under a foreign flag. If the Law of the Sea Treaty would not let us invest under U.S. status, we certainly would not want to go under a foreign flag.

Senator PELL. Then you would absolutely rule out the possibility that Lockheed would ever mine under a new flag?

Mr. WELLING. We would have no such intention whatsoever, and if we say the treaty text itself is impossible to attract the investment capital, I do not see how going under a foreign flag would be of any assistance to us.

Senator PELL. I made notes as we went along. Mr. Welling, you noticed that one condition for mining to take place would be legal stability. I am not asking you this question as a lawyer. I am not a

lawyer and you are not a lawyer. But what kind of legal stability can you expect with the United States outside the framework of international law, in layman's language?

Mr. WELLING. That is a very good question. As I said before, when we look at the treaty, we see it as impossible for us to attract investment capital under the treaty, so that door is closed to us as an investment procedure, so we are looking elsewhere. We do not at the present time say we have an assured legal environment for investment. That is the reason why we are not making big investments at the present time. What we are saying is that we are going to proceed to do our basic work under U.S. laws, and hopefully at a future date, maybe several years downstream, the legal conditions will be such, and the dust will have settled on this issue, so that we can make a determination whether we will have legal stability under U.S. laws. It is the only door open to us.

Senator PELL. Do you see an analogy here to the actions of Libya where Libya wanted to extend customary international law to say that the Bay of Sidra would be completely within its own jurisdiction, and the rest of the world did not accept that, including the United States, and we took action to make sure that that extension was not agreed to? What we are doing here is very like the Libyan action. We will be permitting you to go out and mine an area. The rest of the world will not recognize that. So I am wondering if that is a healthy condition for your investors or stockholders.

Mr. WELLING. Well, Senator Pell, I guess I have to return to the fact that my background is not legal. My background is new technology and business development. So at each particular point we would look at the risks involved. If the risks are low enough for us to feel that we have a reasonable return on our investment, then we would proceed ahead with that investment. So I cannot say at the present time what the legal stability will be 3 or 4 years hence, and how many will have signed the treaty, how many will have put it into effect, et cetera. We will look at it at that particular time.

Senator PELL. But if in looking ahead you found that other companies successfully attracted capital under the treaty, foreign companies, would you be satisfied that the treaty was acceptable?

Mr. WELLING. The only way that it would be acceptable from my personal point of view is if I could attract the investment capital, and I have been assured unequivocally by all those sources of investment capital that I cannot. So that is the only thing I can go on.

Senator PELL. I would agree with you at this time. Do other members of the mining consortium in which Lockheed is a party agree with your view that they will not mine under the treaty?

Mr. WELLING. I am speaking here today as a representative of the Underseas Minerals Resources Committee of the American Mining Congress; and that is the considered view of the American Mining Congress.

Senator PELL. Do all the consortia have the view, too, that they would not want to mine under a flag of convenience, as the years go by and after they find there is too much risk doing what Libya did, saying just unilaterally, this is our right, so we will mine there, and they would not decide to mine under the flag of, for example, my friend, Liechtenstein?

Mr. WELLING. The only way we could mine under the treaty is if some basic changes were made, those that I have indicated. If these are made in the future by some reconvening of the conference, and they say, well, without the United States in it—and this is only my own personal opinion now. In the next few years, if there is a political realization that changes have to be made to entice the investment of the U.S. industry, then that would be a different situation, but the basic conditions for investment have to change. That is what I want to emphasize. A foreign flag has nothing to do with it.

Senator PELL. Your consortium has some foreign companies who are participants, does it not?

Mr. WELLING. Yes, and all of our companies have made the decision that they cannot invest under the treaty.

Senator PELL. But the foreign companies, if they decided to go ahead, is it the French or the Dutch——

Mr. WELLING. We have the Dutch as part of our consortium.

Senator PELL. Well, then, is there any reason why you should not use a Dutch flag?

Mr. WELLING. If a Dutch company makes the decision that it cannot invest under the treaty, and our companies make the decision that they cannot invest under the treaty, I do not see what the relevance is of going under the Dutch flag.

Senator PELL. I must have misexpressed my question. If there is obvious risk to do it under the American system, which is to go it alone, and it is obvious the world structure is being set up and the Dutch are a member of your consortium and also have ratified the treaty, and want to do it under the treaty, is there any reason why they should not do it as the lead member of that particular venture with other American companies participating in it, including Lockheed?

Mr. WELLING. If you are indicating that the Dutch Government would underwrite the operation financially——

Senator PELL. No; I am not.

Mr. WELLING. Well, then, I see no possibility. The only possibility of foreign companies developing ocean mining under the treaty would be strong subsidies such as the Japanese subsidizing industry or the French or Germans or whomever it may be. That is the only approach that I can see. I cannot see it done under venture capital anywhere in the world.

Senator PELL. You do not see it being done by the consortium with a Dutch company under the Dutch flag with American and Dutch money going into it?

Mr. WELLING. Absolutely not. None at all.

Senator PELL. To my mind, that would be a way out.

Mr. WELLING. If I may, Senator Pell, how can we attract investment capital under the Dutch flag if we cannot do it in the United States?

Senator PELL. Because, Mr. Welling, it would be operating under international law, and the way we are doing it, we are operating like Libya, outside of international law.

Mr. WELLING. Let me clarify my position here. We cannot attract investment capital, not because the United States refuses to sign the treaty. We cannot because the treaty itself prevents us from at-

tracting investment capital. It is not because the United States may not be a member. I want to be sure that is clear.

Senator PELL. You mean then your view is, the treaty prohibits private capital?

Mr. WELLING. That is absolutely correct. I want to be sure that you understand me, because I have talked to foreign investors as well as U.S. investors.

Senator PELL. Well, I am getting educated here. In other words, your interpretation of the treaty is that it prohibits the use of private capital?

Mr. WELLING. That is correct, absolutely. It would have that effect.

Senator PELL. Well, I would like to ask the two lawyers who are here if that is correct.

Mr. Kronmiller is an excellent lawyer. Is that correct?

Mr. KRONMILLER. My interpretation of Mr. Welling's remarks is he is referring to the burdens and uncertainties of the treaty, which add up to a situation which, de facto, prevents investment under the treaty. It is not that there is a treaty provision stating that private capital may not be utilized in the LOS seabed regime.

Senator PELL. What would be your answer, Mr. Ratiner, since I am not a lawyer myself?

Mr. RATINER. Senator Pell, I have served as counsel to an ocean mining company in my past.

Senator PELL. In fact, I remember that time. That was one of the reasons my staff was worried about you. They felt that you were like the fox in the hen coop. But I believed that you would serve the United States well and I was right. You did a darn good job. And I was an adviser to that delegation, and I would confirm that you were the principal negotiator.

Mr. RATINER. I thank you for that, Senator Pell. And I am familiar with your staff's trepidations regarding my participation in the process. But I should also point out that I counsel a number of corporations that own investments in developing countries, and I am reasonably familiar with the criteria which go into a decision on both legal and political risk in large corporate investments overseas.

In my opinion, the Law of the Sea Treaty offers not only the only investment climate, but a reasonably attractive one, for the pioneer investors. I think that it is probably best to defer this debate for a few months until we see which of the international mining consortia actually apply for their rights under the Law of the Sea Treaty. They will do so by the 1st of March, 1983, and Mr. Welling, Mr. Kronmiller, and I need not debate further whether or not countries will claim their mining claims under the comprehensive treaty of the Law of the Sea.

Senator PELL. But that was not my question. My question was, what was the accuracy of Mr. Welling's statement that the treaty prohibits private capital?

Mr. RATINER. The treaty does not prohibit it. I think Mr. Kronmiller made that clear. I think what Mr. Welling means is the treaty inhibits by attracting investment. I think that is true, the treaty does inhibit attracting investment. But in fact it is my judgment that the treaty will attract investment, if not by Mr. Welling

then by somebody else who will be glad to step in and take his place with respect to the grandfather rights that are set out in the so-called PIP resolution.

Senator PELL. I was quite startled, Mr. Ratiner, by one statement you made in your testimony, that there is no right now of passage through the Strait of Gibraltar on the part of the United States. Other nations, having signed the treaty, will have that right, but we, not having signed that treaty, then will not have the right to send our vessels into the Mediterranean. Is that a correct statement?

Mr. RATINER. Senator Pell, I do not think it even depends on whether or not any state signs the treaty. The 12-mile territorial sea is now a matter of customary law, with which I do not believe the United States can quarrel. Therefore, our legal right through the Strait of Gibraltar is to go through in innocent passage, which means on the surface. Aircraft should have the permission of the subjacent state before they overfly.

Now, what we actually do in practice, in pursuance of what we claim to be our legal rights, is a different issue from what our legal rights actually are. We do not have the right of freedom of navigation through territorial waters. If I am correct that 12-mile territorial limits are customary law, then we have no right of freedom of navigation through the Strait of Gibraltar.

Senator PELL. Unless we and the subjacent nations have signed the treaty?

Mr. RATINER. Or have agreed with each other.

Senator PELL. So, since we have not signed the treaty we do not have that right?

Mr. RATINER. That is my judgment. We do not have the right of freedom of navigation through territorial waters.

Senator PELL. How would Mr. Kronmiller respond to that point?

Mr. KRONMILLER. Senator, our analysis differs radically from Mr. Ratiner's, and we would be prepared to provide you with a paper reflecting our view. We believe there are important national security implications, and we would like to do that either with you in closed session or by a private consultation.

Senator PELL. I cannot argue with that offer, but if you would send us a memorandum in as sanitized a form as possible, because I think this is of interest to the general community as well. Maybe you could send us two memorandums, one sanitized and one, whatever the opposite is.

[As of the date of publication, the information referred to had not been supplied.]

Senator PELL. Mr. Ratiner, is it your view that Japan and France are likely to sign the treaty or not, or do you have a view?

Mr. RATINER. I do have a few. I believe they will sign the treaty. But this view is founded on my analysis of their interests and not any statement made to me by any official of the Governments of Japan or France. It is an analysis of their interests, the ways in which they are protected by the Law of the Sea Treaty, the things they will lose by not becoming parties to the Law of the Sea Treaty, and the general failure of the United States to be able to persuade our allies at the present time to take actions which they regard as contrary to their own economic interests.

Senator PELL. I am not sure that nations are always guided by their long-term best interests, because if they were we would be going along with this treaty instead of doing what we are doing now, which is one more shot in the foot. I think it depends a great deal on the politics of the situation, and I think you would have to crank that in in the case of France and Japan. That is why I was interested in your reaction to their delegations' views.

Mr. RATINER. I think the politics of the situation are that Japan and France are disposed—and now we are talking about the reactions of individuals and delegates, people who make foreign policy—are disposed in favor of the treaty. The evidence for that is the fact that they voted for the treaty despite pleas from the United States that they not do so.

But as I said, my opinion is founded more on an analysis of their interests, coupled with that disposition which they have. The two together make me believe that they are likely to sign the treaty, and sooner rather than later.

Senator PELL. From your knowledge of history and your intimate connection with this problem for more than a dozen years, when do you think the United States will find itself, because of its own national self-interest, compelled to sign and ratify the treaty?

Mr. RATINER. When efforts to create a minitreaty have flopped and when serious challenges begin to appear on the juridical horizon with respect to our rights of navigation. I think even this administration then will begin to reevaluate its policy. Surely a follow-on administration, whether Republican or Democrat, which is not committed to the principle of consistency in its opposition to the new international economic order, which in my judgment is what underlies the President's decision, any such administration which takes a more pragmatic approach to this problem is likely to negotiate its way back into the treaty.

I think Mr. Welling is not dreaming when he suggests the possibility that the United States might one day ask for additional changes as the price of getting into the treaty because other countries will want the United States in the treaty, and that those changes will in fact be negotiable, which will then create in my judgment a good investment climate and make everybody very happy with respect to law and order in the oceans.

Senator PELL. Mr. Ratiner, how do you account for what you believe is the regidity or shortsightedness of our administration on this issue?

Mr. RATINER. Well, Senator Pell, I have not personally spoken with the President or with his very, most senior advisers, and therefore my view on the subject would be really a guess. But my guess is that what is happening is that the administration is attempting to show the developing countries in a variety of forums across the board that we have had enough of being kicked around in the United States Nations. We are a big, powerful country and we are going to have to find other ways of obtaining our legitimate rights and interests. And that the Law of the Sea in a sense becomes a victim of this important public relations effort, which is really to change, to reduce the appetite of the developing countries for their desire to have massive wealth transfers.

And in that sense I agree with what the administration is doing. I think it is desirable to reduce the developing countries' appetite for what they have been demanding in multilateral fora across the board. On the other hand, I also think that this treaty should be treated as a matter sui generis, because we stand to lose such vitally important freedoms if we stay outside this treaty, including our access to raw materials.

Senator PELL. Thank you. Thank you very much.

Thank you, Mr. Chairman.

Senator PRESSLER. Thank you. If either of you has an additional point that you wish to make that you do not think we have covered, we will be glad to receive it.

This hearing is concluded and I thank the committee and the witnesses very much.

[Whereupon, at 12:05 p.m., the subcommittee adjourned, subject to call of the Chair.]

APPENDIX

NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Washington, D.C., September 23, 1982.

Hon. LARRY PRESSLER,
Chairman, Subcommittee on Arms Control, Oceans, International Operations and Environment, Committee on Foreign Relations, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: On September 15, your subcommittee held hearings on the Law of the Sea Treaty and U.S. policy related to the treaty. Statements by the witnesses, together with the questions and answers which followed, evidence a need for clarification of certain points related to the treaty. For this reason, I respectfully request that you accept this letter and the enclosures for inclusion in the hearing record, to ensure that the record presents the issues fully.

U.S. SEAT ON THE COUNCIL

The treaty text adopted in New York on April 30 does guarantee a Council seat for the "largest consumer" of seabed minerals, but it does not provide any definition for the expression "largest consumer." While LOS Conference participants may have intended that the expression refer to the United States, they did not use appropriate language in the treaty to achieve this objective unambiguously.

By comparison to a claim or challenge based on domestic law, the Congress might well intend to write a statute which says "black is black," but if the statute says instead that "black is white," a court may never look at the intention behind the language. If a statute or treaty is apparently clear and complete on its face, the legislative history or equivalent expressions of intention may never enter into the process of interpretation and application of the statute or treaty. Thus, should the United States claim the "largest consumer" seat as a matter of right, its claim might be challenged by other large consumers such as the Soviet Union or Japan, and the challenge might succeed.

BANKABILITY OF OCEAN MINING

Much has been made of the notion that ocean mining companies or consortia may not be able to secure funding for mining ventures, except by acting under the terms of the LOS Treaty. Actually, the opposite situation is more likely to be true.

I have enclosed a copy of an October 1981 paper on "The Financing of Deep-Sea Mining," by C. R. Tinsley, then the Vice President for the Mining Division of the Continental Bank of Chicago. Mr. Tinsley's paper is an analysis of the LOS Treaty from the perspective of a banker well acquainted with large scale project financing of the type some operators might seek for an ocean mining venture. Mr. Tinsley concludes that while some uncertainties exist for operators outside the treaty, the far greater range of legal and political risk and uncertainty occurs under the treaty. In other words, the treaty is not "bankable."

TRANSFER OF TECHNOLOGY

It has been suggested by some supporters of the LOS Treaty that the treaty's provisions on transfer of technology, while philosophically objectionable, will have little practical effect. This suggestion is grossly inaccurate. In fact, the practical effect of the technology transfer provisions will likely be that no company or consortium operating under the laws of any nation which becomes a party to the LOS Treaty will be able to mine the seabed, because the operator will not be able to acquire the wide array of equipment and skills necessary to assemble a complete and efficient mining system. Many of the relevant technology suppliers, and the patent and intellectual

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property law specialists who advise them, have made it abundantly clear that transfers will not occur under the treaty's terms.

To explain why technology suppliers object to the treaty's terms, I have enclosed a copy of testimony I delivered to the House Committee on Merchant Marine and Fisheries on July 27, 1982. Pages 4 through 8, and Attachments 1 and 2, deal in some detail with the problems the treaty's technology transfer articles create.

WILL MINERS ABANDON THE U.S. FLAG?

Various representatives of the U.S. mining industry have stated repeatedly that mining operators cannot operate under the treaty under any flag, and that they can and will operate under the U.S. flag when the economics of the relevant minerals markets are adequate. The suggestion that mining operators will work under foreign flags to be able to "take advantage of the treaty" is absurd on its face. A very experienced observer of the LOS Treaty process, James L. Johnston, Senior Economist for Standard Oil (Indiana), summed up the point very neatly in a recent letter to the editor of Fortune, as follows: "Now that ocean mining companies have won their freedom from the treaty curse, supposedly they will all incorporate in foreign countries that are signatories to the very treaty they worked so hard to avoid. That makes sense only to smokers of funny cigarettes and lawyer-diplomats who are vainly hoping to regain the lost potential from lucrative sea-law practices."

In conclusion, Mr. Chairman, I respectfully request that questions regarding industry's views on the treaty, and likely actions now that the treaty has been rejected by the U.S. government, be directed to representatives of the appropriate industry groups. Too often we have been faced with responding to inaccurate and misleading statements by self-appointed spokesmen who unfortunately do not have the knowledge or credentials necessary to present industry's case fairly and completely.

Thank you for your consideration of our views.

Sincerely,

RICHARD A. LEGATSKI.

Enclosures.

THE FINANCING OF DEEP-SEA MINING, AMERICAN ENTERPRISE INSTITUTE, CONFERENCE ON U.S. INTERESTS IN THE LAW OF THE SEA: REVIEW AND ANALYSIS BY C. R. TINSLEY*

The sections on deep-sea mining in the latest drafts from the Law of the Sea negotiations represent (select one):

(a) The sword of Damocles over a prospective deep-sea mining company;
(b) What U.S. negotiators deserve;
(c) A victory of ad-hoc concessions to preserve U.S. defense interests;
(d) A threat to U.S. defense interests because of enforced technology transfer;
(e) Developing countries' control over this "common heritage of mankind";
(f) A threat to U.S. access to strategic minerals;
(g) An impossibly difficult and ill-defined mining and taxation system;
(h) A jumble of confused provisions chasing a non-mining goal;
(i) A threat to U.S. sovereignty and existing rights;
(j) All of the above.

Although the selection of (j) would appear to be warranted, this paper will not attempt to define the international lawyers' dissection of the Law of the Sea Treaty (LOST) drafts—a job being undertaken at this Conference by a number of excellent authorities. Rather a perspective will be drawn from the proverbial "bottom line" of the financial world. Will a deep-sea mine return an adequate profit for the investment level given the risks involved?

PROJECT EVALUATION

The evaluation of a minerals project as a candidate for development undergoes a similar investment decision process at a company as in a bank's financial evaluation. The project's parameters are cast into a feasibility study which is carefully costed out and, with the given minerals price forecasts, moulded into a cashflow projection. This projection is tested for its sensitivity to the various risks and is compared to the alternative investments of any type (e.g. bank CD's—16.75 percent for 90 days on October 2, 1981; a 10-year U.S. Government bond—15.72 percent on October 2, 1981; or a refinery expansion in Texas). The expected threshold return varies

*Vice President, Mining Division, Continental Bank of Chicago. The views expressed herein are not to be attributed to Continental Bank.

from company to company and a lower rate may be accepted for a relatively risk-free situation or, perhaps, for a strategic business investment such as a diversification.

A project is often expected to stand on its own and bankers' involvement is via a project financing. If the sponsors or their host governments wish to put cash or to guarantee the borrowings, then we bankers are not really financing the nodule project on a stand-alone basis, but are financing the sponsors themselves—"corporate credits" or "sovereign credits." Commercial banks are the usual source of project financings.

I am not an international lawyer. Parts of the LOST draft are confusing and circular and I have done my best to divine their mathematical import. All errors and omissions are mine although the lack of precision in the various texts did not help.

In this paper, the risks in a project financing are first put into the context of a stand-alone, nodule-venture, model-mine analysis to see if a nodule venture is "bankable."

PROJECT FINANCING

Project financing is desired by a company when a mining project is deemed to be of a risky nature. It is not simply corralling money for a deep-sea mine. It is, more precisely, raising finance which will rely solely on the assets and future cash flows of the nodule mining and processing for the repayment of the debt. The source of repayment, conversely, is not expected to come from the general funds of the sponsoring company itself but from the project on its own. The company uses project financing to offload some of the project's risks to the bank at premiums far less than comparable insurance premiums.

Project financing banks on the generation of future cash flows having a sufficient surplus to satisfy the sensitivity analyses based on the mix of risks assumed by the lenders. Two cases have been prepared for a model mine (See Appendix), namely: under the LOST draft and June 1980 U.S. deep-sea legislation assumptions, respectively.

RISK ANALYSIS

A classification of the impact of each project risk on cash flow predictability is as follows:

Cash flow calculation	Main risk impact thereon
Tons recovered	Reserve, force majeure, completion.
Times: Prices received	Market.
Equals: Gross proceeds.	
Less:	
Royalties, fees	Political.
Operating costs	Economic.
Interest expense	Funding.
Depreciation/amortization	Completion.
Overhead	Participant.
Taxes	Political.
Equals	Net after tax.
Plus: Depreciation/amortization	Completion.
Less:	
Capital expenditures	Completion.
Loan repayment	Debt/equity ratio, funding, foreign exchange.
Equals: Net cash flow.	

However, as will emerge in this paper, the LOST Draft imposes many elements of Political Risk above normal levels for mining projects.

RESERVE RISK

After analysis by the bank's engineers that sufficient quality reserves are proven for a mine life twice the loan life, the banks will "take" or absorb this risk. Nodules are presently classified as a "resource," a term which means it has not yet been elevated to an economic reserve. I believe banks will eventually be able to take the reserve risk for nodules.

However, various LOST clauses affect mine life. The review conference could limit the loan repayment period to 7½ years or less, which is short for a project financing. Also the cost of establishing reserves is doubled in the mine-site banking provision and the requirement for data disclosure. And, although security of tenure is "assured" in the Treaty and Annex III, a contracting deep-ocean mine developer's access to the reserves in any area can be compromised by warnings from the Authority in the Penalty clause and broad rule and regulation discretion throughout the LOST, to the point of acceptance of the Authority's control—(Annex III Article 4.6(b)). Yet, the Authority acts to retain sovereign rights to deep-ocean minerals.

OPERATING RISK

Because of the three distinct phases and jurisdiction for a deep-sea mining operation, this risk should be viewed in three sequential components: Mine Site, Ocean Freight, and Port/Process Plant.

(Technical Component).—With known technology and experienced management, banks will usually take this risk component. If the technology is new (as will most probably be the case with the mine and process plant for deep-sea mining), a warranty by the company on the eventual success of the new, unproven technology may be required from the company. Otherwise, banks will want to see extensive pilot-plant and demonstration-plant testing on a continuous basis with the accompanying technical feasibility studies by a number of reputable consultants in the field.

However, technology transfer is mandated in the LOST; the Authority can judge management's qualifications; and the contractor must train other operators. These raise operating costs and disagreement raises the risk of the contract termination.

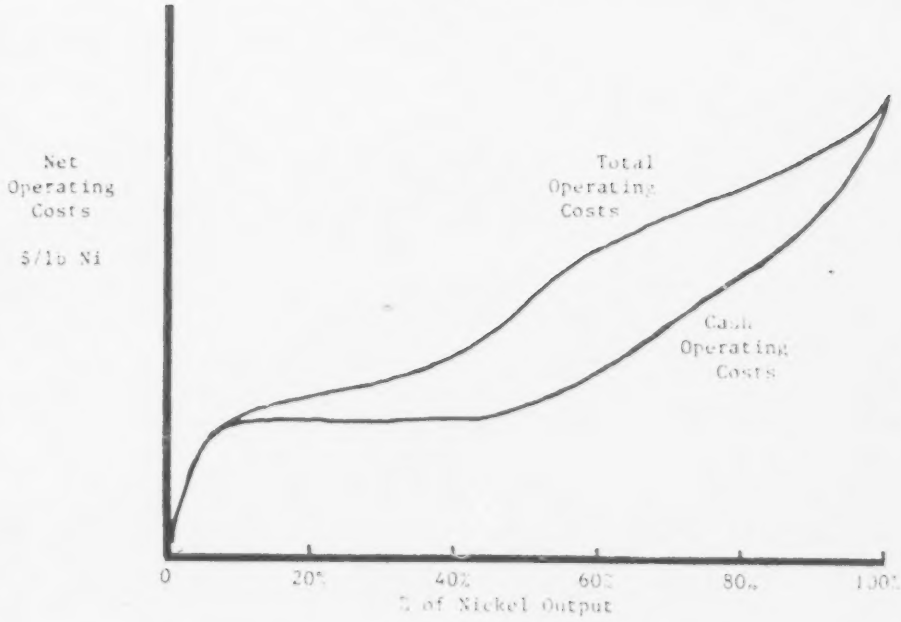
But even if the technology works and tonnage expectations are achieved, this is overridden by the production limitations in *any* year—the Production Ceiling related to growth in nickel demand.

(Economic Component).—The adverse impact of inflation or productivity on operating costs is much more difficult for the banks to absorb, and very few banks can understand, define, and share the economic risk component.

The mine's forecasted operating costs will be compared with the cost curve (see Figure 1 for the present world nickel cost curve) to gauge the acceptable risk level for the bank. However, comparison with the potentially tax-free, low-interest, and grant-funded mining operation to be undertaken by the Enterprise is basically "no-contest."

Figure 1

THE WORLD'S NICKEL PRODUCTION COST CURVE



BEST COPY AVAILABLE

If a mine's costs are in the lower one-third or one-half of world production, the bank feels safe in assuming economic risk since other production will become uneconomic and will likely be shut down first if prices fall. However, this is not in the LOST thinking since land-based producers are to be protected (in some unknown manner) and the Production Ceiling discriminates against the operating nodule miners.

MARKET RISK

A bank will first of all study the market in depth, looking at such things as world industry structure, supply and demand forecasts in relation to the Production Ceiling, and the nature of consuming nations' consumption sectors viz. the price elasticities and the substitution for each metal in these sectors. All of these factors will be assembled to generate—likely with the assistance of econometric techniques—a set of forecasts of metals prices.

The strategic and critical materials debate will also be factored into the price forecasts since it implies that prices will be higher due to future political disruptions, cartel attempts, or even wars and blockades. The most-affected commodities from deep-sea mining are cobalt and manganese although U.S. dependence (some say vulnerability) on "unstable sources" is rapidly declining in any event and stockpile levels are adequate in manganese but short for cobalt. For perspective, the stockpile deficiency for cobalt equals 3.2 years production of the model nodule mine. However, the economic importance of disruptions to supply cannot be denied from past experience as follows:

FREE-MARKET PRICES DURING PAST DISRUPTIONS

[Nominal dollars per pound]

Market, year	Event	Before shortage	At peak	Percent change
Cobalt, 1978	Zaire	$6.85	$50.00	630
Nickel, 1969	Strike	1.60	7.50	370

This leads to price forecasts under different scenarios:

[Cobalt—Dollars per pound]

Scenario	1980	1981	1982	1983
Base: No stockpile purchases [1]	$25	$22	$17	$16
Zaire disrupted		22	64	27
Zaire and Zambia disrupted		22	157	46

[1] However, 5.2 million-pound purchase recently from Zaire at $15 per pound.

Source: Charles River Associates, 1981

The critical risk level is pierced when the metals price drops below the level of operating costs for other producers and then below the level of operating costs for the nodule miners.

Besides a drop in the sales price, market risk also occurs when sales cannot be made due to unacceptable product quality; an offtake contract is cancelled (perhaps because of extended delays caused by a force majeure event); or the LOST Production Ceiling shuts down the operation. The Authority is empowered to participate in producer associations or cartels which might act to bolster prices but the Production Ceiling risk overwhelms this "benefit."

All of the metals from nodules—nickel, copper, cobalt, and manganese—are traded in a competitive world marketplace, although producer dominance of nickel and cobalt production affects producer list quotations and manganese ore prices are agreed for annual offtake contracts set during a mating season each year between producers and consumers. The existence of market risk at present should be evident from the model-mine cashflow assumptions (October 1981 prices in brackets) for nickel—$3.20 per lb (dealer nickel—$2.12 and copper—$1.10 per lb. ($0.75) At present, it is doubtful that Market Risk can be fully taken by the banks.

FUNDING RISK

Banks will usually accept the risk that future interest rates get out of hand. However, a ceiling can be imposed by the Authority, which would not likely be an acceptable risk to the project sponsors.

POLITICAL RISK

Both banking and mining industries require a stable statutory, regulatory and legal environment when undertaking a mining project of any length—usually 10 years or more in a project financing. Mining developments have proceeded under certain onerous regimes in the belief that such a regime would at least be stable and that the risks of development could thus be estimated with a higher degree of certainty. For the first time in my experience in over 250 mining projects worldwide, the LOST brings forth a higher degree of uncertainty.

Banks will often take legal/regulatory risk in a stable country. In the event that banks decide that they cannot absorb political risk, then some of these risks may be covered by export credit agencies (such as Eximbank), government agencies (World Bank, ADB), or insurance organizations such as OPIC outside the U.S. or Lloyds of London. Since the LOST raises many Political Risk questions, the following breakdown of each political risk commonly considered in a projecting financing will highlight the relevant concerns:

Currency inconvertibility.—This is not a problem except for a producer with foreign exchange risk.

Legal agreements.—This is the most serious area of concern since the LOST Draft raises a huge number of uncertainties—many issues are "to be resolved later." I have already mentioned that the miner has "security of tenure" but the Authority holds the Area's "sovereign rights." This would normally be acceptable with a sovereign that wants development to proceed. The LOST is not very subtle in demonstrating that the Authority really does not want ocean mining development to proceed.

The main cost articles in the LOST drafts with Political Risk overtones concern work plans, rule making, joint venture arrangements with the Enterprise, and the Penalty/suspension clause—all deemed one-sided and subject to arbitrary changes.

War and insurrection.—This risk may be accepted by the banks especially if the sponsoring State offers protection to its national's project. A virtually immobile mining ship is defenseless—one weakness in the strategic minerals argument in favor of a U.S.-sponsored deep-sea mining operation.

Tax changes.—The financial, or actually "taxation", terms of LOST contracts are laid out Annex III, Article 13, where the first objective is the maximization of revenues for the Authority, not the maximizing of profitability for a deep-sea mine. The Tax for a "model" mine has been computed (See Table 1) based on my interpretation of this rambling article. At first glance, this can be accommodated provided that it is a credit against U.S. taxes.

Borrowing restraints.—The Authority can set debt levels and acceptable interest rates, which cuts across the flexibility required in floating-interest-rate project financings—the standard for the mining industry.

Non-Government activists.—This risk comes from environmentalists, unions, and—unfortunately in today's world—terrorists. The latter is difficult to absorb in a highly-charged political climate.

Governing law.—Under various LOST articles, the Authority has sovereign immunity. This is difficult in the context of rule-making (the Authority and Council) and dispute settlement.

Arbitration.—This appears to be acceptable, although I defer to the international lawyers here.

Inequity.—This appears to be handled well, although one is dealing from a lopsided structure favoring the Authority at almost every turn.

In all, I refer to this assemblage of political risks as "Treaty Risk," the most serious being the undefined rules, regulations, and recourse in the LOST Draft. Even the U.S. domestic legislation is subject to eventual Treaty Risk under Title II of the Deep Seabed Hard Mineral Resources Act of 1980—"Transition to International Agreement"—although Section 2.01 hits the prerequisite for acceptance of any LOST on the head that "the practical implications for the security of investment of any *discretionary* powers granted to an international regulatory body, the structures and decision making procedures of such bodies . . . [should not] discriminate against exploration and commercial recovery activities. . . ." (Italic and brackets are mine.)

FORCE MAJEURE RISK

One of the reasons why banks can handle the risk sharing inherent in project financings is their ability to fund themselves on a variable repayment basis, usually at floating interest rates determined by the amount of interest required to buy such deposits. We do not own the money. We have to pay to acquire the use of it. Because of this funding capability, banks can usually absorb the ordinary force majeure risk both during construction (e.g. delay in supplying a critical part) and during operation (e.g. caused by an accident or a strike).

However, force majeure is made up of three categories "outside the control" of the contracting parties, namely: Acts of Nature e.g. floods, earthquakes, acts of man e.g. strikes, lockouts, and acts of Government e.g. infrastructure blockades.

The first two are ordinary, usually acceptable, Force Majeure risks. The latter is in reality an extraordinary force majeure because it could easily force mine closure. Again, since the Authority has such control over a contractor's destiny, banks may be unwilling to accept this part of Force Majeure risk with Political Risk overtones.

PARTICIPANT RISK

The joint venture participants in a manganese-nodule mining consortium often have one weak partner (who supplied the exploration data and the technology) and a strong party (providing the management and arranging the financing). Banks are well capable of analyzing the participant companies, although the Authority finally ranks qualified companies and selects the applicants for a contract.

COMPLETION RISK

This term is referred to by some as "cost overrun" risk. Banks usually do not take the risk that the project is not completed on time, at budget, and capable of satisfying a pre-agreed minimum production test. The company commits to covering cost overruns and, in return, the usual practice in a project financing is that once an objective completion test is met, the banks will thereafter absorb virtually all of the project risks (basically apart from gross negligence, fraud, or in this case, Treaty Risk).

The risk breakdown for a bankable nodule mine project financing may eventually be:

Risk category	Absorbed by
Reserve	Bank.
Operating:	
Technical/Management	Bank, company warranty. [1]
Economic	Bank.
Market	Bank, except production ceiling.
Funding	Bank.
Political (Treaty)	Insurer (?) company, Government (?).
Force Majeure:	
Ordinary	Bank.
Extraordinary	Insurer (?), company.
Participant	Bank.
Completion	Company.

[1] If new technology.

All of this assumes that the project's bottom line is sufficiently attractive to warrant development in the first place. Two cases follow for a 10-year nodule project financing at 50 percent debt which show that annual leveraged net cash flow as a percentage of the original investment of $1,030 million (in 1981$) for a 3-million-tonne-per year model mine, average:

Under LOST Annex III, Art. 13 12.6 percent, under U.S. legislation 12.8 percent. (See Assumptions and Tables 1 and 3 attached.) This would be below the targeted return for any company in the present interest rate environment of 16–18 percent. Favorable U.S. tax treatment has also been assumed, which is far from certain to be realized.

One must be very careful when interpreting this sort of rate of return number. Actually each company calculates a wide range of rates-of-return based on their judgment of the sensitivity of the project to the various risk levels outlined above and very often on an unleveraged basis for comparison purposes. An individual in

the private, government, or academic sectors will not be privy to the cost cutting R&D being undertaken which will improve the rate of return. It is also vitally important to recognize that the rate of return on the first project is front-loaded with a heavy dose of R&D (that is, if it can get its mine development contract from the LOST Council in the first place).

The second nodule venture without the R&D load is the real target. If one drops the R&D figures from the "model" mine, the returns increase to:

Under LOST 14.8 percent, under U.S. legislation 15.0 percent.

In fact, process efficiencies and learning curve improvements would probably increase the return even further. Therefore, access to the second and further mine sites is crucial to the investment decision.

CONCLUSION

The financing of deep-sea mining on a project basis will be difficult for two major reasons: Treaty risk uncertainties (political risks); production ceilings.

Otherwise, financing for the project will have to come from either governments, guarantees carrying the full faith and credit of the sponsoring companies, or equity (cash). But if a bank is unwilling to "take" or absorb certain risks, which it traditionally has been able to do in mine project financings all over the world, then the audience can be safe in anticipating that the companies themselves are not going to take on these risks either.

APPENDIX

ASSUMPTIONS

MODEL MANGANESE NODULE MINE

[1981 dollars]

Start of construction (year 1)	1985.
Start of production (year 4)	1.5 million dry metric tonnes (dmt).
Production (20 years) (years 5–25)	3 million dmtpy [1]
Moisture content (30 percent)	

[1] Widely regarded as the base case for a deep-sea mine

PRODUCT PROFILE

Metals	(Dry) ore content (percent)	Metals recovered (percent)	Annual salable (dmt)	Form	Price 1981 (dollars per pound)	Required price[1] 1981 (dollars per pound)	Annual proceeds 1981 (dollars in millions)	Sales proceeds (percent)
Ni	1.5	90	40,500	Granules	$3.20	$3.85	$285.7	44
Cu	1.3	90	35,100	Cathodes	1.10	1.74	85.1	13
Co	0.25	75	5,625	Electro	10.00	12–27.50	124.0	19
Mn	0.29	80	696,000	Crude	0.10		153.4	24
							648.2	100

[1] Required for new greenfield land-based mine production.

Investment Profile (1981$ million):	
Exploration and R&D (two sites)	$150
Mining system (two ships)	235
Port, process plant, preproduction	550
Working capital (4 months op-costs)	95
Replacement capex (annual)	35
Expenditure:	
Year 1	132
Year 2	308
Year 3	396
Year 4	44

Operating Cost Profile (1981 $/dmt ore):	
Exploration/development	$1.70
Mining	20.70
Ocean freight (charter)	11.20
Processing	54.90
Administration	2.30
Selling costs, Misc	4.50
Total	95.30

LOAN PROFILE

Debt is 50 percent on capital costs and working capital, plus capitalized interest. All-in interest expense of 15 percent. R&D covered by 100 percent equity (cash).

LOST CASH FLOW PROFILE

Cost and Sales Price Escalation: 1981–1987; 12 percent p.a.; 1988–1992 10 percent p.a.; 1993–1998 8 percent p.a.

Ten year straight-line depreciation/amortization. Tax is 50 percent of net profit less "portion of attributable net proceeds" payable to the authority.

UN LOST parameters (Appendix III, Article 13 of 9/80 Treaty Draft) Interest on Unrecovered Development costs—10 percent p.a., Annual Fixed Fee—$1 million.

Combination "Financial Contribution" (Taxes):	*Percent*
"Production Charge"	
First Production Period	2
Second Production Period [1]	4

[1] Occurs when "Unsecured Development Costs" reduced to zero.

Percentage of "Attributable Net Proceeds: [2]

[In percent]

	First production period	Second production period
ROI between 0 and 10 percent	35.0	40
ROI between 10 and 20 percent	42.5	50
ROI greater than 20 percent	50.0	70

"Development Costs" recovered over 10 years, straight line.

Mining Sector "Unrecovered Development Costs" is ratio of 235:1080 of total pre-production Unrecovered Development Costs.

During Production, 50 percent of replacement Capex is for Mining Sector.

Taxes to LOST are a credit against U.S. taxes.

U.S. CASH FLOW PROFILE

"Removal Tax" is 3.75 percent of 20 percent of Gross Proceeds and is a credit against U.S. taxes.

[2] That is 25 percent of "Net Proceeds". This may be higher—to some unknown level set by the Authority per Annex III, Article 13.6(e).

Depreciation/Amortization over 5 years for U.S. tax purposes.
Tax Rate of 48 percent All-in, therefore, no depletion allowance assumed.
Annual NCF and Investment reduced to 1981 dollars and Investment is original $1,030 million per Investment Profile above.

TABLE 1.—MODEL MANGANESE NODULE MINE "LAW OF THE SEA" TREATY CASHFLOW EFFECT

[In millions of dollars]

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Less:																		
Gross proceeds								704	1,548	1,703	1,873	2,061	2,225	2,404	2,595	2,803	3,028	3,270
Annual fixed fee	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Production charge								14	31	34	37	41	45	48	52	112	122	130
Operating costs								310	683	751	826	909	981	1,060	1,145	1,237	1,335	1,442
Recovered development cost								104	208	207	208	208	207	208	208	207	208	104
Subsequent recovered development cost																		
Interest expense								0	8	18	28	39	51	64	78	93	109	127
Equals net proceeds (NP)								0	152	136	120	104	88	72	56	40	24	8
Less Portion of attributable NP								275	465	556	653	759	852	951	1,055	1,113	1,229	1,458
Equals LOST proceeds								29	58	70	82	95	107	119	132	195	215	255
Less Tax								246	407	486	571	664	745	832	923	918	1,014	1,203
Equals net after tax								109	175	208	244	285	319	357	395	361	400	474
Less:								137	232	278	327	379	426	475	528	557	614	729
Capex	100	22	19	21	208	542	782	96	84	92	101	111	120	130	140	151	163	176
Loan principal					(112)	(308)	(483)	(166)	107	107	106	107	107	107	107	107	107	107
Capitalized interest					8	37	92	144										
Plus:																		
Recovered development cost								104	208	207	208	208	207	208	208	207	208	104
Subsequent recovered development costs																		
Equity	100	23	20	22	105	272	392	0	8	18	28	39	51	64	78	93	109	127
Equals:																		
Lost net cash flow	0	0	0	0	0	0	0	167	257	304	356	408	457	510	567	599	661	677
Cumulative	(100)	(123)	(143)	(165)	(270)	(542)	(934)	(767)	(510)	(206)	150	558	1,105	1,525	2,092	2,691	3,352	4,029

TABLE 2.—LOST "FINANCIAL CONTRIBUTION" ACCOUNTING

[In millions of dollars]

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Capital Expenditures (1981 dollars)	100	20	15	15	132	308	396	44	35	35	35	35	35	35	35	35	35	35
Escalation	0	2	4	6	76	234	386	52	49	57	66	76	85	95	105	116	128	141
Cumulative Capex	100	122	141	162	370	912	1,694	1,790	1,874	1,966	2,067	2,178	2,298	2,428	2,568	2,719	2,882	3,058
Research and Development:																		
Capitalized Interest	0	0	0	0	8	37	92	144										
"Annual Fixed Fee"	0	1	1	1	1	1	1											
"Development Cost" (DC)	100	123	143	165	382	962	1,837	2,077	2,161	2,253	2,354	2,465	2,669	2,809	2,939	3,090	3,253	3,429
"Mining Development Cost"	22	27	32	37	85	215	411	464	506	552	602	658	718	783	853	929	1,010	1,098
"Interest on Unrecovered Development Cost"								0	44	44	41	37	32	24	15			
Replacement Capex (Mining)								0	42	46	50	56	60	65	70	76	81	88
Recovery of Development Costs								(23)	(51)	(55)	(61)	(67)	(71)	(79)	(86)	(93)	(101)	(86)
Mining "Unrecovered Development Costs" [1]								441	436	413	373	317	243	146	26	(2)	(2)	(2)
"Attributable Net Proceeds"								69	116	139	163	190	213	238	263	279	307	365
"Return on Investment" (percent)								13	23	25	27	29	30	29	30	30	30	33
"Portion of Attributable NP"								29	58	70	82	95	107	119	132	195	215	255
"Cash Surplus"								(40)	(58)	(70)	(82)	(95)	(107)	(119)	(132)	(2)	(2)	(2)
Production charge rate (percent)								2	2	2	2	2	2	2	2	4	4	4

[1] Mining "Unrecovered Development Costs" = Cum. (Mining Development Cost (1987)—"Cash Surplus" + "Interest on Unrecovered Development Cost" + Replacement Capex. (Mining)—"Recovery of (Mining) Development Costs").
[2] NA—Not Appropriate; neg—Negative; Quotes refer to LOST, Annex III, Section 13 definitions.

TABLE 3.—MODEL MANGANESE NODULE MINE U.S. LAW CASHFLOW EFFECT

[In millions of dollars] [1]

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
LOST proceeds	246	407	486	571	664	745	832	923	918	1,014	1,203
Plus:											
"Portion of attributable NP"	29	58	70	82	95	107	119	132	195	215	255
"Production charge"	14	31	34	37	41	45	48	52	112	122	130
Equals: LOST net proceeds	289	496	590	690	800	897	999	1,107	1,225	1,351	1,588
Less:											
U.S. removal tax	5	12	13								
Difference to tax depreciation	104	208	207	208	208	0	(208)	(208)	(207)	(208)	(104)
Equals: U.S. taxable income	180	276	370	482	592	897	1,207	1,315	1,432	1,559	1,692
Less: Tax at 48 percent	86	132	177	231	284	430	579	631	687	748	812
Equals: Net after tax	94	144	193	251	308	467	627	684	745	810	880
Less:											
Capex	96	84	92	101	111	120	130	140	151	163	176
Principal repayment	0	107	107	106	107	107	107	107	107	107	107
Plus: Depreciation/amortization	208	416	414	416	416	208	0	0	0	0	0
Equals: U.S. net cash flow (NCF)	206	369	408	460	506	448	390	437	487	540	597
Less: LOST net cash flow	167	257	304	356	408	457	510	567	599	661	677
Equals: Difference	39	112	104	104	98	(9)	(120)	(130)	(112)	(121)	(80)
Annual NCF: Investment:											
U.S. (percent)	9.2	15.0	15.1	15.5	15.5	12.6	10.2	10.6	10.9	11.2	11.5
LOST (percent)	7.4	10.4	11.2	11.9	12.4	12.9	13.4	13.8	13.4	13.8	13.0

[1] Brackets mean negative figure.

STATEMENT OF RICHARD A. LEGATSKI, NATIONAL OCEAN INDUSTRIES ASSOCIATION, WASHINGTON, D.C., BEFORE THE COMMITTEE ON MERCHANT MARINE AND FISHERIES, U.S. HOUSE OF REPRESENTATIVES, JULY 27, 1982

THE LAW OF THE SEA: OPTIONS FOR THE UNITED STATES

Introduction

The Reagan Administration announced on January 29, 1982 that the United States would continue negotiations at the Third U.N. Conference on the Law of the Sea (LOS) during the March-April session in New York, and identified several specific points on which substantive improvements in the draft LOS Treaty would be necessary, to make the treaty acceptable to the United States. At the conclusion of the negotiations, the Administration reviewed the final treaty text (which was adopted over U.S. objection), and, on July 9, 1982 the President announced that none of the required improvements had been achieved. As a consequence, the U.S. Government will not sign the treaty when it is opened for signature later this year.

The National Ocean Industries Association (NOIA) has worked with this and previous Administrations, seeking major improvements in the treaty, consistent with our long-standing position that a suitable treaty would be highly desirable. NOIA's set of objectives has been quite similar to that set out in the President's January 29 position statement, and the Association has, therefore, strongly supported this Administration's course of action in relation to the treaty. We now very much agree with the decision not to sign the treaty, due to the unwillingness of most conference participants to give serious consideration to meaningful improvements in the text.

The decision not to sign the LOS Treaty leads to a series of questions our government must now consider. Those questions boil down to, "Where do we go from here?" What sort of national policy toward the oceans is appropriate at this juncture, and how might that policy best be carried out?

We are pleased that the Committee on Merchant Marine and Fisheries has undertaken to examine these questions about the future of United States and international ocean law. The United States clearly has very significant interests at stake, so our actions as a nation in response to an unacceptable treaty will have quite substantial effects on our future.

The members of NOIA engage in virtually every kind of ocean resource development activity and, as a consequence, will be substantially and directly affected by any developments in domestic or international ocean law. Given the nature of our membership, our primary interests which will be affected include petroleum and non-fuel mineral development on the continental shelf and in the deep ocean beyond national jurisdiction; any laws or obligations regarding transfers of technology, either to domestic or foreign purchasers; and any other constraints which would tend either to retard resource development without a clear showing of cause, or to subject resource activity to any form of governance not consistent with the principles of the free enterprise economic model. I note for the record that our membership includes a substantial segment of the American fishing industry, but I defer to other more expert witnesses to discuss the special concerns of that industry.

MISCONCEPTIONS ABOUT THE TREATY'S REAL EFFECTS

On numerous occasions, including this Committee's hearing on July 20, 1982 the supporters of the LOS Treaty have made statements about the treaty and its provisions which may result in certain misconceptions about the actual effects of the treaty's provisions on the United States and U.S. nationals. For this reason, I am taking this opportunity to offer responses to some of the misleading statements, to correct the record.

The United States is not guaranteed a Council seat

During the March-April session of negotiations in New York, LOS Conference participants added language to the draft treaty which assured the "largest consumer" of seabed minerals of a seat on the Council of the International Seabed Authority. While it appears that the intention behind this change was to "guarantee" a permanent seat for the United States, should the United States become a party to the treaty, it is not clear that the actual effect of the new language would be to dedicate a permanent U.S. seat.

Unfortunately, the expression "largest consumer" is not defined at all, much less in a way which would genuinely guarantee the United States a seat on the Council. Arguably, one might define "largest consumer" in any number of ways. For example, definitions could take into account dollars expended to import the relevant

metals, domestic production of those metals, domestic consumption on either a gross tonnage or a per capita basis, or a number of other factors. In short, no one can say with certainty what the term really does mean.

What is clear is that, at least under some possible definitions, the United States is not now the largest consumer of the minerals found on the deep seabed, and it may not be in years to come. Using annual consumption of manganese as an example, according to data compiled by the U.S. Bureau of Mines, in 1980 the Soviet Union consumed 8.9 million metric tons of the metal, while in the same year the United States consumed only 1.18 million metric tons. Projections of Soviet consumption through 1990 suggest that this sort of differential will persist. See "The Nonfuel Mineral Outlook for the U.S.S.R. through 1990," published by the Bureau of Mines in December, 1981.

PIP does not guarantee access to seabed minerals

The resolution of Preparatory Investment Protection adopted at the March-April session of the LOS Conference is claimed by treaty supporters to guarantee certain mining operators, including each consortium with U.S. participation, access to at least one seabed mining site. But the "guarantee" is conditioned on each of those operators meeting four specific requirements. One of those requirements is that the applicant for "pioneer investor" status meet the technology transfer obligations imposed on it by the terms of the treaty.

As the following paragraphs will demonstrate, it is extremely unlikely that any mining consortium can acquire all the necessary technologies for its own operation if it chooses to operate under the terms of the treaty, let alone meet its obligation to transfer those technologies to the Enterprise (or to other nations under the terms of the "Brazil clause"). For a variety of sound commercial reasons, technology suppliers will almost certainly refuse to sell their products and services to any purchaser operating under the terms of the treaty. Also, a number of relevant technologies might be withheld by action of the U.S. Government, based on possible conflicts between transfer to foreign purchasers, and the constraints imposed by U.S. export control law.

Absent the ability to acquire the necessary technologies, mining companies will not be able to gain "pioneer investor" status, and they will not be able to conduct mining anyway, because their mining systems will be incomplete.

Technology transfer is a serious practical problem

Supporters of the treaty suggest that the treaty's provisions for transfer of technology, while "philosophically objectionable," would not pose significant practical problems. This is simply not true. As demonstrated by the companies directly involved in technology supply, and by statements from experts in protection of intellectual property rights and in patent law, suppliers of technology would face tremendous avoidable risks if they chose to sell under the treaty's terms. Those risks are clearly great enough in magnitude to deter sales altogether.

The risks the treaty would impose on technology suppliers are manifold. They may be summarized as follows:

In some instances transfer would be mandatory, thus making it impossible to conduct an arm's-length negotiation, and arrive at the "meeting of the minds" essential to a normal commercial contract.

"Technology" is defined much more broadly than in commercial practice, to include the very essence of the engineering skill which permits owners of an advanced technology to maintain a competitive advantage in the marketplace.

Employees of the "Enterprise" who misuse confidential or proprietary information after a transfer are subject to only token penalties, so the risk of commercial or military espionage is quite real.

There is no equivalent to "patent" protection on the high seas, since U.S. patent law is not extraterritorial in effect.

Should a loss of proprietary information occur, the text provides no compensation whatever for the owner of the affected technology.

Any technology not made available to the "Enterprise" must also be withheld from the resource company which is seeking the right to mine in the first instance, so that the resource company may not be able to conduct operations, for want of needed equipment, and the technology supplier will lose a market.

The burdens imposed on technology suppliers would create a disincentive to innovation, thus damaging the economies of all nations at least indirectly.

A tremendously damaging precedent would be set by entry into force of a transfer regime of this type, with the result that many other international commercial negotiations might be adversely affected.

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In support of my statement that the burdens imposed under the treaty would likely deter transfers altogether, I have attached to my testimony copies of letters from two organizations, the Licensing Executives' Society (LES), and the Intellectual Property Owners, Inc. (IPO). LES has estimated that its members are involved directly in roughly 85 percent of all transfers of technology throughout the world. IPO represents an assortment of domestic and multinational corporations whose technologies are now routinely transferred under existing international law and practice. Both organizations' statements indicate that, in their opinions, American technology suppliers would be unwise and unlikely to engage in transfers under the terms of the LOS Treaty to any purchaser, regardless of the purchaser's nationality (see Attachments 1 and 2). In other words, no mining company in any nation which accepts the treaty is likely to be able to acquire necessary American technology to conduct mining operations. Similar positions have been taken in the past by various other organizations, including the American Patent Law Association, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

Article 302 does not protect defense-sensitive technologies

Several of the technologies applicable to deep ocean mining are presently subject to export controls under U.S. law, and may not be sold to potential adversaries. Proponents of the LOS Treaty, however, claim that Article 302 of the treaty will eliminate any problem in this respect, by allowing the United States to prevent any transfers of defense-sensitive technologies.

Article 302's supposed protections fall short of the mark in several respects. First, the Article says a nation may refrain from disclosing information contrary to the "essential interests of its security," but provides no definition for the expression "essential interests." Thus the scope of the protection is vague at best. Second, a nation which invokes the protection and withholds a technology may be challenged regarding its action, and the matter would then be subject to mandatory dispute settlement proceedings. In the course of those proceedings, the precise nature of the technology and the reasons for its sensitivity would likely have to be revealed, to prove that it is indeed sensitive. Finally, if a nation succeeds in withholding a technology from transfer on this basis, then the mining company which has applied for the license in the first place is denied the right to use the technology itself—Annex III, article 5(3)(b) prohibits an operator from using any technology it is not able to transfer to the Enterprise. The net effect of a series of denials of access to technology would be to render mining either grossly inefficient, or outright impossible, through denial of the ability to use the best available technology.

This points up one of the major ironies of the treaty—that transfer or technology, once offered by the United States as the quid pro quo for assured access to minerals, is now perhaps the largest single barrier to that assurance of access.

At this point it is appropriate to note for the record just how broad a range of technologies are affected by both the commercial and the security-related shortcomings of the treaty. Much more is involved than merely building and equipping a mining ship. Every technology which might be used to mine efficiently is involved, thus including computer hardware and software, satellite navigation technology, communications equipment, robotics, and more. The list grows even longer if it is extended to the technologies for deep seabed resource recovery related to minerals other than nodules, including polymetallic sulfides, possibly petroleum, and anything else of interest which may be discovered in years to come.

The treaty is not bankable, but mining may occur outside the treaty

Treaty supporters suggest that financial institutions would not advance funding to mining operators outside the context of the treaty, and thus that mining must occur under the treaty or not at all. This line of argument fails in several respects.

It is very clear that mining is not "bankable" in a traditional sense under the treaty. A detailed statement to this effect was made last fall by C. Richard Tinsley, then Vice President for Mining, Continental Bank of Chicago. Mr. Tinsley points out that far more legal and political uncertainties would exist under the treaty than outside it, thus making the investment market less attractive under the treaty than under alternative legal arrangments.

Representatives of U.S.-based mining consortia have stated very directly that they would never operate under the terms of the treaty, but that they would be willing to undertake mining based on U.S. law, either unilaterally, or through a "reciprocating states" structure, when the economics of the minerals market are adequate. If the members of this Committee have any doubts regarding this matter, I would respectfully suggest that you go to the source—invite the senior management of the relevant companies to put their opinions on the record.

The oil industry does not support the treaty

Treaty proponents have on several occasions claimed that the oil industry supports the treaty. Speaking for the American oil industry, at least, this is not an accurate claim. NOIA represents all major U.S. producers of offshore oil and gas. We adamently oppose the current treaty text, in part specifically because of its provisions on the development of the resources of the continental shelf, and also because of the adverse effects it would have on any mineral development, including petroleum, in the deep ocean beyond national jurisdiction.

Again, if the Committee has any doubts about the industry's position, I respectfully suggest that it invite comments either from individual oil companies, or from the trade organizations which represent them in Washington.

THE LAW OF THE SEA TREATY VERSUS EXISTING LAW

Arguably, certain aspects of the LOS treaty are as good as, or even somewhat better than existing international law. But the real benefits are few and far between, and hardly justify U.S. acceptance of the multitude of major short-comings in the text. In the following paragraphs I will outline certain of the primary U.S. interests in the development of international law, and offer a brief evaluation of the treaty on each point.

Navigation

During the Reagan Administration's review of the then-draft treaty text in late 1981 and early 1982, the Defense Department reportedly characterized the treaty's navigation articles as "marginally acceptable," and noted that it could not accept any deterioration in those provisions. No changes have occurred, so apparently the "marginally acceptable" evaluation would still apply.

The argument often advanced in support the "need for the treaty's provisions on navigation to be adopted, that commercial and military navigation might be disrupted in times of crisis absent the treaty's rules to minimize conflicts over passage through straits and "choke points," may not really hold water. Looking at an example of a real crisis where disruptions did not occur, "during the Iran-Iraq war, the 15 million (42-gallon) barrels of crude oil going through the Strait of Hormuz continued to pass each day despite (1) that islands in the strait were themselves part of the dispute, (2) one of the belligerents, Iran, has not had a record of respecting international law and (3) the proposed treaty on law of the sea which is intended to reduce the potential for conflict in international straits, had yet to come into force." See "Not So Dire Straits," by James L. Johnston, Standard Oil Company of Indiana. Mr. Johnston's paper concludes with "the essential fact in the Strait of Hormuz crisis . . . that it did not occur."

Petroleum Development on the Outer Continental Shelf

Absent the LOS Treaty, each nation may develop the petroleum on its continental shelf out to an ill-defined distance from its coasts, and retain absolute rights over access to the resource, and over any revenues derived from exploitation of the resource. While the LOS Treaty would give a clearer definition to the seaward extent of coastal jurisdiction, the formula established for this purpose is not clearly in the best interest of the United States. In this regard, see "Boundary reforms of the proposed law of the sea and recommended U.S. action," by Hollis D. Hedberg, Professor Emeritus of Geology at Princeton, in the February 15, 1982 Oil and Gas Journal.

Under the treaty, one major disadvantage exists as contrasted with existing law. Any petroleum (or other mineral) development seaward of the 200 nautical mile limit of the "economic zone" would be subject to a requirement to share revenue with developing nations through the mechanism of the International Seabed Authority. For petroleum, the obligation would be to transfer a percentage of wellhead value of all production, in the nature of a royalty, to the Authority. The rate of payment would begin at one percent of wellhead value in the fifth year of production, rising one more percent each year to a level of seven percent in the twelfth and subsequent years.

Some idea of the effect on the United States of this sort of revenue sharing obligation can be gained from an estimate made in 1976 by Treasury Department economists. Using estimated production from the continental shelf off the United States, seaward of the 200 mile limit, and positing a five percent royalty on that production, with a price of only $10 per barrel of oil, the drain on the Treasury was calculated at $1 billion per year. With an oil price of $35 per barrel, that figure jumps to $3.5 billion per year. See "Petroleum Revenue Sharing from Seabeds Beyond 200 Miles Offshore," by James L. Johnston, Standard Oil Company (Indiana), in Vol. 14 of the Marine Technology Society Journal.

Though it would be desirable to define more clearly the seaward limits of the nation's continental shelf resource jurisdiction, NOIA would prefer that this be accomplished through domestic legislation rather than by acceptance and application of the LOS Treaty's formula.

International trade in non-fuel minerals

As a general proposition, the United States and America industry at present can compete fairly and effectively for access to foreign supplies of the various non-fuel minerals vital to our economy and our national defense capability. Of course, with many foreign suppliers, we may face the prospect of occasional supply interruption, artificial price inflation, and other difficulties which could increase costs for U.S. purchasers, or disrupt some industries if supply shortfalls occur.

Under the treaty, the United States would effectively be denied access to the minerals of the seabed, for the several reasons already noted. Absent the treaty, the minerals of the seabed could serve as secure long-term supplies for American industry and defense needs for several of the most important metals.

Beyond direct denial of access under the treaty, acceptance by the United States of the treaty's provisions would amount to acquiescence in precedents for multilateral production controls and commodity agreements which limit supply, drive up prices, and penalize all consumers. Those precedents are key elements in the efforts of developing nations to establish a "New International Economic Order," the terms of which are antithetical to capitalism and free enterprise.

The New International Economic Order

The Reagan Administration's detractors suggest that the decision not to accept the LOS Treaty was "ideologically" motivated. They do not generally acknowledge the "ideological" motivations of the developing nations, or compare those motivations with the Administration's.

The principles, or ideology, underlying the Administration's actions are clear—to ensure the continuation of free enterprise and capitalism, in the face of a direct challenge. The ideology of the developing states is equally clear—one need only examine the U.N. Resolutions which are the founding documents of the "New International Economic Order" (NIEO).

A good critical analysis of the NIEO "philosophy" was done recently by Gary Knight, a professor on the Law Faculty at Louisiana State University. Professor Knight, who has been following the LOS negotiations for a number of years, points out that "Capitalism is the most equitable, the most moral economic system ever devised on this planet." By comparison, he states that the "NIEO is not a plan for producing. It is not a plan for generating wealth or value. It is a plan for first diminishing and then shuffling around what already exists, which is a polite way of saying stealing from those who have and doling out on a gratuitous basis to those who have neither the energy nor the will to produce things of value for themselves. That is a harsh characterization, but a damned deadly accurate characterization."

In support of his description of the NIEO, Professor Knight refers to U.N. General Assembly Resolution 3021 which established the NIEO concept, and General Assembly Resolution 3281, the "Charter of Economic Rights and Duties of States." As he points out, the latter document "calls for . . . establishment of the right to nationalize and expropriate foreign property without payment of compensation; the right to form commodity cartels with arbitrary price and production control mechanisms; a one-nation, one-vote system for international decisionmaking in economic, financial, and monetary institutions;" and a variety of other equally discriminatory preferences for developing nations over developed nations. The various provisions of the Law of the Sea Treaty dealing with access to and allocation of deep ocean resources follow the NIEO "model" very closely. (See "The Impact of the Third Law of the Sea Conference on Ocean Industry: Or, There is Such a Thing as a Free Lunch, and Capitalism is Paying for It," paper delivered June 21, 1982 to ... Law of the Sea Institute at Halifax).

CONCLUSIONS

Having pointed out an assortment of reasons why the United States cannot afford to adopt the LOS Treaty, I will now turn to some suggestions about "where we go from here." There are a number of actions the U.S. Government could usefully take, to ensure that American companies will have the ability to explore for and develop ocean resources of all kinds within a free enterprise context. The direct effect of those actions will be to assure the United States of secure sources of supply for a variety of energy and mineral and food resources.

NOIA proposes that the United States consider certain changes to domestic laws regarding access to and use of the ocean and its resources, together with actions on an international level which will strengthen our national position under international law.

I will first offer several suggestions on possible changes to U.S. law and practice which NOIA believes would be useful both to industry and to the nation. We do not consider this listing to necessarily exhaust all the possibilities for improvements, but do believe it will identify several steps in the direction of overall advancement of our national interest. We propose:

A statutory definition of the seaward limits of the U.S. Outer Continental Shelf, generally following the line of reasoning developed by Dr. Hollis Hedberg, who suggests "a single, simple base-of-slope-related formula for the oceanward boundaries of coastal state jurisdiction over mineral resources beneath the oceans."

Unilateral establishment of an "Exclusive Economic Zone" offshore the United States, adopting the desirable aspects of the LOS Treaty formulation for an "EEZ" while avoiding the unsuitable terms within that formulation.

Amendments to the Deep Seabed Hard Mineral Resources Act to (1) extend the Act's coverage to all minerals on or under the seabeds beyond national jurisdiction; (2) remove LOS Treaty transitional provisions; and (3) delete, or convert to domestic use, provisions on revenue sharing.

Amendments to the Magnuson Fishery Conservation and Management Act, to delete treaty-transition provisions (and perhaps other modifications, as to which we defer to representatives of the fishing industry).

On each of these points, we have yet to develop specific statutory language to achieve the proposed changes, but we look forward to working with this Committee, and with others in the Congress and the Administration, to that end.

On an international level, we propose that the United States government:

Urgently pursue conclusion of a "reciprocating states" agreement, pursuant to the Deep Seabed Hard Mineral Resources Act, with as many other nations as possible.

Work to "educate" other governments, particularly among our Western free market allies, regarding the flaws in the mining articles of the LOS Treaty, with a view to encourage those allies to join the U.S. in rejection of the treaty and adoption of alternative measures.

Pursue bilateral and multilateral agreements as appropriate to gain clear and enforceable support from other nations for the position the U.S. is taking on development of various aspects of international law, including navigation, boundaries, resource access and development, and trade in technology and commodities.

Thank you again for inviting me to testify, Mr. Chairman. I would be pleased to respond to any questions the Committee members may have.

[Attachment 1]

LICENSING EXECUTIVES SOCIETY, INC.,
Stamford, Conn., July 20, 1982.

Mr. RICHARD A. LEGATSKI,
National Ocean Industries Association,
Washington, D.C.

DEAR MR. LEGATSKI: Mr. Riley has referred to me your letter of July 8 regarding the proposed Law of the Sea Treaty.

We appreciate your interest in the opinions of the Licensing Executives Society USA/Canada and welcome the opportunity to provide input. Your letter has been reviewed by our Society's Executive Committee and our reply has unanimous support.

In answer to your first question, it is our opinion that most, if not all, U.S. mining companies will choose to operate under the U.S. flag if the U.S. is not a party to the Treaty. To do otherwise would be extremely shortsighted. The following are our reasons for this opinion:

1. Deep sea mining is one technical area where the U.S. is the unquestioned leader. Further, most of this technology was developed with private capital. It would be unfair to the stockholders of U.S. companies and contrary to good management to give this very valuable technology to competitors without fair and equitable consideration.

2. Industry has beome increasingly aware that the U.S. is losing its innovative leadership. U.S. companies are working to reverse this trend. Giving away U.S. deep sea mining technology would further erode our country's position of leadership.

Our Society is dedicated to technology transfer. However, we believe that technology transfer should not be compulsory but instead should be handled on a proper

business basis under terms that are equitable to both the purchaser and those who have invested in development of the technology.

Your second question deals with the precedent that acceptance of the unwise technology transfer provisions of the proposed Treaty may create. In our opinion, the precedent would be very bad and could adversely affect other international negotiations now in progress. As one example, we believe that if the U.S. accepts these provisions it would seriously undermine the U.S. position in the current Paris Convention negotiations (the one hundred year old Paris Convention is a treaty relating to patent and trademark matters). Alteration of Paris Convention as suggested by the less developed countries and the communist countries would be disastrous to international technology transfer interests of U.S. companies.

In recent years there has been considerable pressure from the less developed countries to radically change the established laws and treaties dealing with technology transfer. One of their premises is that in the past they have been unfairly exploited and therefore should now have special treatment. Assuming abuses have occurred in the past, in our opinion it is fallacious to assume that the economic plight of these countries can be alleviated by undermining the profit-motivation system that now exists in the free world. To the contrary, we believe such actions would only serve to inhibit the flow of much-needed technology into the poorer countries.

Please feel free to call on LES for further assistance in this important matter.

Sincerely,

WM. MARSHALL LEE, *President.*

NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Washington, D.C., July 8, 1982.

MR. WILLIAM E. RILEY, JR.,
Battelle Development Corp.,
Columbus, Ohio.

DEAR MR. RILEY: On January 8, 1981, in your capacity as President of the Licensing Executives Society, Inc. (LES), you signed a letter to Secretary of State Haig, setting out the views of LES on what was then a draft version of the Law of the Sea Treaty. As you know, on April 30 of this year, the Third U.N. Conference on Law of the Sea voted to adopt a final treaty text, over U.S. objections. The final text of the treaty contains precisely the same provisions you objected to in the earlier draft, dealing with mandatory transfer of technology.

The U.S. government is now in the process of deciding how to respond to the treaty. It is clear many of the Reagan Administration's objections to the treaty, including objections to the technology transfer provisions, have not been cured in the final round of negotiations. Thus it is probable that the United States, at least during the current Administration, will not sign a treaty, or consider sending it to the Senate for consent to ratification.

Congressional oversight hearings in the next few weeks will be used as means to evaluate the treaty, and to consider alternative actions the U.S. might take in lieu of accepting the treaty. I expect to be invited to testify at one or more of these hearings, to offer the views of the National Ocean Industries Association on "where we go from here." To bolster the position I plan to advance, I ask your assistance in obtaining the views of LES on certain questions which are almost certain to arise.

Proponents of the LOS Treaty argue that other nations will accept its terms, and produce two effects--first, that mining companies in the United States will not be willing to mine the seabed under the U.S. flag, and second, that U.S. technology suppliers will simply divert their attention to foreign markets. Several mining companies have declared their willingness to operate under the U.S. flag without the treaty, rather than defect to another flag nation which is a party to the treaty. But this still leaves open the question of how U.S. technology suppliers will act in relation to foreign mining concerns, when those concerns are based in nations party to the treaty.

Given the collective experience of LES in technology transfers, and your knowledge of the technology transfer articles in the LOS Treaty, do you believe U.S. technology suppliers would sell their products and skills to nations subject to those treaty provisions? A few individual corporations have already answered this question in the negative, but I would be interested in knowing how broadly their position would be supported.

As a related issue, what would be the views of LES on methods the U.S. government might adopt to ensure to the extent possible that the technology transfer arti-

cles in the LOS Treaty do not serve to establish an undesirable precedent for other international negotiations?

Your response to these questions, and any related comments you may care to offer either individually or for LES, would be most welcome. I will make every effort to see to it your views are fully addressed in the forthcoming hearings, in support of our mutual objective of avoiding disruption of the business of international transfers of technology.

Thank you for your assistance.

Sincerely,

RICHARD A. LEGATSKI.

LICENSING EXECUTIVES SOCIETY, INC.,
Stamford, Conn., January 8, 1981.

Gen. ALEXANDER M. HAIG, Jr.
Office of the Secretary-Designate,
Department of State,
Washington, D.C.

DEAR GENERAL HAIG: The Licensing Executives Society, Inc. U.S.A./Canada (LES) is alarmed about the possible far-reaching adverse effects of the provisions for mandatory transfer of technology that are presently included in the proposed "Law of the Sea" treaty. These provisions call for the transfer of technology at the discretion of the Enterprise. This, in our opinion, would undermine the normal negotiation at "arms length" for technology transfer, which we believe essential to continued technical development of United States industry.

LES is further concerned about the precedent-setting effect of provisions on the negotiation of other international arrangements.

Therefore, we respectfully urge that before these provisions are allowed to proceed in their present form they be subjected to in-depth study of their potential harm to United States industry.

For your information in evaluating our recommendation, the Licensing Executives Society, Inc. U.S.A./Canada is a nonprofit, professional and educational organization comprised of members actively involved in the field of technology transfer. We are a business-oriented society of about 1800 members from industry, law firms, universities, research institutes and various government organizations. We have sister societies in 17 other countries throughout the world. A significant portion of our membership is directly involved and intimately familiar with the problems of international technology transfer, both to underdeveloped and developed countries. It has been estimated that our members are involved in over 85 percent of worldwide technology transfer.

We believe this matter to be extremely important. Our membership includes many qualified and experienced individuals who would be willing to assist in any capacity to give it the detailed study we believe necessary. Please contact us if we can be of any service.

Sincerely,

W. E. RILEY.

[Attachment 2]

Intellectual Property Owners, Inc. is a nonprofit organization representing the owners of patents, trademarks and copyrights. As such, IPO represents many of the companies which are directly concerned with threats to our extremely valuable technologies, especially threats which would arise through international agreements such as the Law of the Sea Treaty.

Elliot Richardson's testimony to this Committee was that the President's decision not to sign the Treaty is a grievous loss to U.S. industry, the decision having been taken for purely ideological reasons inconsistent with economic realities. We view that testimony as being derived from Mr. Richardson's innocence of any appreciable knowledge of the facts. Our member companies that stand to gain or lose through deep seabed mining solidly support the President's decision. Although Mr. Richardson spent four years at the taxpayers expense negotiating the proposed Treaty, he ignored the advice of those directly interested in deep seabed mining. When U.S. industry saw the text that Mr. Richardson negotiated the experienced experts in the area saw it for what it actually is—a giveaway of our technologies to a U.N. entity and substantially to anyone else who wants it. No businessman who came home with such an agreement would receive his next paycheck. It would appear that Mr.

Richardson never understood the significance of the technology transfer provisions and had no practical experience in this area. This is bad enough, but to realize that the United States delegation has been led and controlled for so long by an inexperienced person is plainly shocking.

It is our opinion that the technology transfer provisions in the Treaty are so unsound that U.S. companies would not have mined the seabed under them, and would generally not license foreign companies operating under the Treaty. The reason is not difficult to understand. The Treaty provides that all technology of an operation which is used in seabed mining must be made available to the "Enterprise" and to any "developing State" upon request "at fair and reasonable" terms. However many high technology companies do not want to transfer their valuable technology to others; they do not want to license their discoveries to their competition. Why should U.S. technology, furthermore, be made available under a Treaty to developing iron curtain countries? Developing new technologies is very risky and expensive. For every success there are literally scores of failures. Yet the Law of the Sea Treaty would force those who have taken the risks and eventually succeeded to share the fruits of those efforts through mandatory technology transfer schemes.

Mr. Richardson, I am informed, made the interesting statement to the Committee that technology transfer is really a moot point because the technology is available commercially. This is not accurate. However, if the technology was available commercially there is obviously no need for the technology transfer provisions of the Treaty. Unfortunately our U.S. negotiators to the Treaty conference apparently did not press this point when the text was being formed.

It is unfortunate, to say the least, that our U.S. negotiators did not consult with affected U.S. industry circles and those experienced in technology transfer matters. Had this been done years ago we may not now be faced with an unacceptable Treaty. As it was not done that way organizations like IPO, with expertise in technology transfer policies, hailed the President's action in announcing that the U.S. will not sign this Treaty. To IPO this action was singularly sound and hopefully heralds the dawn of a new era in which our policy in matters affecting vitally important U.S. technology will be made in consultation with those who best understand the issues.

EXCHANGE ON LAW OF THE SEA BETWEEN SENATORS PERCY AND PELL AND THE DEPUTY SECRETARY OF STATE-DESIGNATE KENNETH W. DAM, SEPTEMBER 16, 1982

The CHAIRMAN [Senator Percy]. Thank you, Senator Boschwitz, very much. I yield to Senator Pell, who has another commitment, to finish up his questions, but I would like to ask one first while he is here because we served—he as Chairman and I as the Ranking Member of the Committee that embraced the oceans—and we figured we had all the power of the Committee because, after all, three-fourths of the world is under water, so we had three-fourths and the whole rest of all the other Subcommittee had the other fourths of the world.

But it does have the important Treaty of the Law of the Sea, which has been a point of contention and controversy for some time, now, and a question of deep disappointment to every major ally we have—all of the developed world. It appears as though there is going to be a signature put on that treaty in December without the United States participating.

Just like the Charter of Economic Rights and Duties which I managed as a member of the delegation to the United Nations some years ago, we were just unable to resolve our differences and it was enacted without our signature. But we were joined in by most of the developed nations of the world and no one has ever heard of the charter since then. It did not mean a thing.

This is now a treaty and we may be the only developed country that does not sign it. I think some of the reasons we are not signing it, are quite valid. There has been a lack of resilience and I think there are a couple of legitimate points that cause grave concern to us and to others. But still, I thought we were 95 percent of the way in getting there but we have not quite closed the gap.

In the spirit of consultation I have advised the Secretary that in my own judgment, I believe, of other members of this Committee we ought to make one last effort. The new Secretary of State, who is one of the great negotiators—has many skills but the negotiating skill is one that he really appreciates and understands—this falls in the Under Secretary for Security Affairs. We have a new Assistant Secretary there.

There have been prominent people whose names I have given the Secretary that feel that there can be and should be one last effort made. Then at least if we cannot

find a way to accommodate, even if it meant delaying it, other countries, I should think, would prefer rather than rushing ahead and signing it in December, delaying it a month or two or three to see whether we cannot find one last accommodation.

Do you have any feeling, Mr. Secretary, as to whether there could be the possibility that this could be reopened and one last effort made to see whether or not we cannot solve our differences and find a basis for a treaty that could be signed by us?

I ask this because the Constitution provides unusual powers to the Senate for treatymaking. The former High Commissioner of Germany, Jack McCloy testified before us that it was really the responsibility of the Senate for treatymaking, so we take that responsibility very seriously and we are concerned because the negotiations are all conducted by the executive branch. We do not conduct those negotiations.

We are concerned that we may be letting an opportunity pass which would help bind us together with the developing world.

Mr. DAM. Let me say, first of all, that this is an extremely important matter and I know that the views you have expressed have been expressed by a number of close observers of the treaty and then negotiations. I would like to be able to say yes, we will make one last try, particularly sitting in the position I am sitting in now, but I have to say that immediately before Secretary Shultz was named there was a thorough review of this question within the executive branch under the leadership of the President.

All the agencies concerned looked at that very question and it is my understanding that they came to the conclusion that there was no possibility of accomplishing that goal.

Secretary Shultz and I can look at it again, but I have to say that I think that the question has just been thoroughly investigated.

The CHAIRMAN. I would like to respectfully disagree with the executive branch. I do not think we have the best possible team on that job. I do not think we gave it the priority that it really deserved at the crucial times, nor to other countries. We have talked to our counterparts in other countries and they have been very disappointed in the United States in their performance.

It is not any where near equal to what we are doing in the Middle East, what we have done in the Caribbean, what we have done in the Falkland Islands, what we have done for arms control. We just have not done it.

I would hope in view of the fact that people whom you and the Secretary highly respect and strongly support would be willing to put their time into making one last effort. I would hope we could take another look and not just take the judgments that were made by those that were not on the firing line, that were not participating, that just accepted, and said what has now been done is unacceptable.

I would have come to that same conclusion also. But what I am saying is I think we could have gotten a better treaty if we had worked a little more skillfully, a little more in the kind of a way that George Shultz has always negotiated these things. He generally ends up with successes, not failures, and this is the biggest single failure we have on our hands, and it will be the failure of this Administration.

That judgment is being made by prominent, outstanding Republicans who are knowledgeable in this field, and they will not hesitate to say so to our dismay later. So from every standpoint I hope you will take another look at it.

Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

Just following up that thought for a second, you mentioned that prominent Republicans have felt this way. I would also like to point out that every principal negotiator in the life of the treaty—and it has been a long life—Stevenson, Nielson and Richardson—were all card-carrying Republicans and there is nothing partisan about this at all.

You as a lawyer must be as baffled as I am as a non-lawyer by the present approach, which is we consider the treaty sort of a bowl of cherries and those elements of it which we like—such as the 12-mile territorial waters and the 200-mile economic zone—those cherries we munch with delight and say that is customary international law.

But those cherries that are in the same bowl which start talking about regime of law for the seabed, we say those are objectionable and we do not recognize those. Those are not customary law. We are obviously bound for trouble eventually. I do not think there is any question in any of our minds that within twenty years or thirty years or ten years we will have to be party to a Law of the Sea Treaty.

Now, getting to a specific suggestion or thought along the line of consultation, I would hope that you might at least consider that the United States would partici-

pate in a commission, which we are presently entitled to do by virtue of our signature on the final act, which you know we have signed, which means we have been there.

If we participated in the preparatory commission, we might be able to achieve some of these objectives that we have, making it less difficult for the next Administration or in the latter stages to go ahead with final hearings to it.

In this regard, I was disappointed yesterday to hear Assistant Secretary Kornmiller say that we would not participate in the preparatory commission, and I would hope that you might have a chance to review yesterday's hearing record in this regard.

So going to my specific thought, what harm would there be in attending the preparatory commission to try to achieve some results in our favor, and that implies no obligation to go further in the ratification process.

Mr. DAM. I am not able to respond to that because I have not looked at that question. I understand that there are several procedural questions of that character. I certainly will familiarize myself with that question and look at the hearing transcript.

Senator PELL. Let me put it to you another way. If I am correct and it is possible to participate in the preparatory commission without any further adherence to the treaty, for the purpose of making it more acceptable to us, would you be supportive of that viewpoint or not? What would be your view?

Mr. DAM. I would have to review the pros and cons and the considerations that must have been testified to yesterday, because I am not familiar with them.

Senator PELL. I would urge you strongly to review the testimony of yesterday, and if you do find that it is possible, it would seem to me in the American national interest that we do participate in the preparatory commission to try to make it a little less objectionable.

I think, frankly, it is possible to do that, so I would hope that you would take that suggestion under serious consideration.

Mr. DAM. I certainly shall.

Senator PELL. In this regard, I would be appreciative—I realize it may come after we voted for your confirmation—if you would give me a written response to this question.

Mr. DAM. Yes, I shall do so.

Senator PELL. Thank you very much.

THE WHITE HOUSE,
OFFICE OF THE PRESS SECRETARY,
Santa Barbara, Calif., July 9, 1982.

STATEMENT BY THE PRESIDENT

The United States has long recognized how critical the world's oceans are to mankind and how important international agreements are to the use of those oceans. For over a decade, the United States has been working with more than 150 countries at the Third United Nations Conference on Law of the Sea to develop a comprehensive treaty.

On January 29 of this year, I reaffirmed the United States' commitment to the multilateral process for reaching such a treaty and announced that we would return to the negotiations to seek to correct unacceptable elements in the deep seabed mining part of the draft convention. I also announced that my Administration would support ratification of a convention meeting six basic objectives.

On April 30 the Conference adopted a convention that does not satisfy the objectives sought by the United States. It was adopted by a vote of 130 in favor, with 4 against (including the United States) and 17 abstentions. Those voting "no" or abstaining appear small in number but represent countries which produce more than sixty percent of the world's Gross National Product and provide more than sixty percent of the contributions to the United Nations.

We have now completed a review of that convention and recognize that it contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations. That is an important achievement and signifies the benefits of working together and effectively balancing numerous interests. The United States also appreciates the efforts of the many countries that have worked with us toward an

acceptable agreement, including efforts by friends and allies at the session that concluded on April 30.

Our review recognizes, however, that the deep seabed mining part of the convention does not meet United States objectives. For this reason, I am announcing today that the United States will not sign the convention as adopted by the conference, and our participation in the remaining conference process will be at the technical level and will involve only those provisions that serve United States interests.

These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime with such major problems. In our view, those problems include:

Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries.

A decision-making process that would not give the United States or others a role that fairly reflects and protects their interests.

Provisions that would allow amendments to enter into force for the United States without its approval. This is clearly incompatible with the United States' approach to such treaties.

Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits.

The absence of assured access for future qualified deep seabed miners to promote the development of these resources.

We recognize that world demand and markets currently do not justify commercial development of deep seabed mineral resources, and it is not clear when such development will be justified. When such factors become favorable, however, the deep seabed represents a potentially important source of strategic and other minerals. The aim of the United States in this regard has been to establish with other nations an order that would allow exploration and development under reasonable terms and conditions.

DEPARTMENT OF STATE,
Washington, D.C., September 3, 1982.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations,
U.S. Senate.

DEAR MR. CHAIRMAN: I am pleased to inform you that the United States, the U.K., the F.R.G., and France have just concluded an Interim Agreement on Polymetallic Nodules. The Agreement was signed in Washington on September 2, 1982.

The Administration regards the Agreement as an important step towards a more comprehensive seabed mining arrangement as authorized under Section 118 of the Deep Seabed Hard Minerals Act. All of the signatories have domestic laws relating to the development of seabed mining to ensure that pending the entry into force of the Convention, exploration is conducted in an orderly and peaceful fashion. The Agreement therefore creates the opportunity for the early resolution of conflicts by voluntary procedures among the pioneer explorers. It also provides that the parties will consult before signing other agreements on ocean mining.

The Agreement has been framed so as not to prejudice the position of any of the signatories with respect to the Third U.N. Conference on the Law of the Sea. It is our hope to pave the way in the development of a stable legal regime for the exploration and exploitation of the resources of the deep seabed.

Should you have any questions concerning the Agreement or any aspects of our developing oceans policy, please contact James L. Malone, Assistant Secretary for the Bureau of Oceans and International Environmental and Scientific Affairs, at 632-1554.

With cordial regards,
Sincerely,

POWELL A. MOORE,
Assistant Secretary for Congressional Relations.

AGREEMENT CONCERNING INTERIM ARRANGEMENTS RELATING TO POLYMETALLIC NODULES OF THE DEEP SEA BED

THE PARTIES TO THIS AGREEMENT

Having regard to investments made in exploration, research and other pioneer activities relating to the polymetallic nodules of the deep sea bed;

Noting the adoption by the Third United Nations Conference on the Law of the Sea of a Convention on the Law of the Sea and of a Resolution Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules prior to the entry into force of the Convention on the Law of the Sea and the provision of that Resolution concerning resolution of conflicts among pioneer operators;

Recalling the interim character of legislation with respect to deep sea bed operations enacted by certain Parties;

Desiring to make appropriate provisions for avoiding overlaps in the areas claimed for future pioneer activities in the deep sea bed and to ensure that, during the interim period, such activities are carried out in an orderly and peaceful manner;

Emphasizing that this Agreement is without prejudice to the decisions of the Parties with respect to the Convention on the Law of the Sea adopted by the Third United Nations Conference on the Law of the Sea;

Desiring also to avoid any discrimination among Parties in the implementation of this Agreement;

Desiring further to insure that adequate areas containing polymetallic nodules remain available for operations by other states and entities in conformity with international law;

HAVE AGREED AS FOLLOWS

1. The object of the present Agreement is to facilitate the identification and resolution of conflicts which may arise from the filing and processing of applications for authorizations made by Pre-Enactment Explorers (PEEs) on or before March 12, 1982 under legislation in respect of deep sea bed operations enacted by any of the Parties.

2. In the case of a conflict between the areas claimed in such applications, the Parties shall afford the applicants adequate opportunity, and shall encourage them, to resolve such conflict in a timely manner by voluntary procedures.

3. The Parties with whom applications for authorizations have been made by PEEs on or before March 12, 1982 shall follow the procedures set out in Part I of the Schedule hereto in respect of such applications.

4. The Parties shall consult together:

(a) With a view to coordinating and reviewing implementation of this Agreement;

(b) Before issuing any authorization under their respective laws relating to deep sea bed operations;

(c) In regard to consideration of any arrangement to facilitate mutual recognitions of such authorization, it being understood that any such arrangement shall not enter into force before January 1, 1983;

(d) Before entering into any other bilateral or any multilateral arrangement between themselves or any arrangement with other States, with respect to deep sea bed operations.

5. In the event that any of the Parties with whom applications for authorizations have been made by PEEs on or before March 1982 enter into an agreement for the mutual recognition of authorizations granted under their respective laws in respect of deep sea bed operations, the Parties concerned shall apply the procedures and impose the requirements set out in Part I of the Schedule hereto.

6. To the extent permissible under national law, a Party shall maintain the confidentiality of the coordinates of application areas and other proprietary or confidential commercial information received in confidence from any other Party in pursuance of cooperation under this agreement in accordance with the principles set out in Part III of the Schedule hereto.

7. The Parties shall settle any dispute arising from the interpretation or application of this Agreement by appropriate means. The Parties to the dispute shall consider the possibility of recourse to binding arbitration and, if they agree shall have recourse to it.

8. The Schedule hereto is an integral part of this Agreement and Part IV thereof shall apply for the interpretation of the Agreement.

9. The Parties shall not enter into any supplementary international agreement inconsistent with this Agreement.

10. This Agreement may be amended by written agreement of all the Parties.

11. This Agreement shall enter into force upon signature.

12. After entry into force of this Agreement, additional States may be invited to accede to this Agreement at any time with the consent of all Parties.

13. Any Party may denounce this Agreement on 30 day's notice to the Government of the United States of America, and in no case shall the denunciation have effect before 3 January 1983.

Done at Washington in the English, German and French languages, all texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the United States of America, which will transmit a duly certified copy to each of the other signatory Governments.

THE SCHEDULE, PART I—APPLICATION PROCEDURES FOR PREENACTMENT EXPLORERS

1. Each Party as provided in paragraph 3 of the Agreement shall forthwith inform the other Parties of entities which have filed applications with it.

2. Any application filed on or before March 12, 1982 shall be deemed to be filed on that date.

3. Each Party shall with all dispatch determine whether:

(a) Each application filed with it fulfills its domes requirements;

(b) The applicant is a PEE with respect to the area applied for (an applicant filing on behalf of a Party shall itself be deemed a PEE for that application;

(c) The area is bounded by a continuous boundary;

(d) The area is reasonably compact.

4. Each Party shall:

(a) Notify the other Parties of the results of the initial processing under paragraph 3 above;

(b) With the other Parties establish the final list of applications to which this Agreement applies;

(c) Inform the other Parties whether the applicant has applied for the same area, or substantially the same area, to one or more other Parties;

(d) If the applicant agrees, inform the other Parties of the coordinates of the area specified in any application filed with it;

(e) Endeavor to determine the exact locations of any conflicts.

5. No Party shall issue any authorization before January 3, 1983.

6. Where it is informed of the relevant coordinates, each Party shall notify each of its applicants who is involved in a conflict that a conflict exists. Such notification shall include coordinates indentifying the areas in conflict and the identity of each applicant with whom conflict has arisen.

7. Each Party shall ensure that domestic conflicts are resolved pursuant to its respective domestic requirements. Upon agreement of the applicants, domestic conflicts may be resolved in accordance with the international conflict resolution procedures specified in the Schedule. The Parties shall enter into consultations if it appears that the resolution of a domestic conflict might affect the international conflict resolution procedures, or vice versa.

8. (1) Each Party shall accept amendments to applications to which this Agreement applies only if they:

(a) Pertain to areas with respect to which the applicant is a PEE (the area applied for in an amendment need not be adjacent to the area applied for in the original application); and

(b) Are made in order to resolve an existing conflict with respect to that application.

(2) Each Party shall process any amendment filed pursuant to this paragraph in accordance with the procedures described in the foregoing provisions of this Part except that paragraphs 2, 3(c), 3(d), and 4(c) shall not apply to amendments.

(3) Amendments filed under paragraph 8 of the Schedule shall be eligible for mutual recognition in accordance with the terms of an agreement entered into by any of the Parties pursuant to paragraph 5 of the Agreement.

PART II—CONFLICT RESOLUTION FOR PREENACTMENT EXPLORERS

9. (1) Where there is an international conflict, the Parties shall use their good offices to assist the applicants to resolve the conflict by voluntary procedures.

(2) If, within six months from the entry into force of an agreement between the Parties referred to in paragraph 5 of the Agreement, notwithstanding the good offices of the Parties, all applicants involved in an international conflict have not resolved that conflict, or are not parties to a written agreement submitting the conflict to a specified binding conflict resolution procedure, the conflict shall be resolved by binding arbitration in accordance with Appendices 1 and 2 if a Party so elects.

(3) The procedures provided in the Appendices shall commence ten days after a Party notifies the other Party or Parties of the decision to elect arbitration.

Part III—Principles of Confidentiality

10. In implementing the provisions of paragraph 6 of the Agreement, Parties shall apply the following principles:

(a) The confidentiality of the coordinates of application areas shall be maintained until any conflict involving such area is resolved and the relevant authorization is issued, except on the basis of a demonstrated need to know and adequate assurances that the confidentiality of the information shall be maintained by the recipient;

(b) The confidentiality of other proprietary or confidential commercial information shall be maintained in accordance with domestic law as long as such information retains its character as such.

Part IV—Definitions

11. In this Agreement:

(a) "Activities" means the undertakings, commitments of resources, investigations, findings, research, engineering development, and other activities relevant to the identification, discovery, and systematic analysis and evaluation of polymetallic nodules and to the determination of the technical and economic feasibility of exploitation;

(b) "Authorization" means any license, permit, or other authorization issued under the national law of a Party which authorizes the holder to engage in deep sea bed operations in a specified area or areas;

(c) "Conflict" means the existence of more than one application or amendment covered by this Agreement submitted by different applicants:

(1) Whether filed with the same Party or with more than one Party; and

(2) In which the deep sea bed areas applied for overlap in whole or part, to the extent of the overlap;

"International conflict" means a conflict arising from applications or amendments filed with more than one Party;

"Domestic conflict" means any other conflict;

(d) A "pre-enactment explorer" ("PEE") is an entity which was engaged, prior to the earliest date of enactment of domestic legislation by any Party, in deep sea bed polymetallic nodule exploration by substantial surveying activity with respect to the area applied for; and

(e) "Polymetallic nodules" means any deposit or accretion on or just below the surface of the deep sea bed consisting of nodules which contain manganese, nickel, cobalt, or copper.

Appendix 1

Arbitration procedure

1. In this Appendix, "Party" means a Party to this Agreement which is also concerned in the arbitration, and "other Party" includes any such Party or Parties.

2. The parties presenting the case shall seek to agree in writing within sixty days after the expiry of the ten-day period provided by paragraph 9(3) of the Schedule on three arbitrators, or, if they agree to have only one arbitrator, on that one arbitrator.

3. Any Party may object to the choice of any arbitrator or arbitrators under paragraph 2, by written notice received by the other Party within thirty days after the expiry of the period provided by paragraph 2 above. Upon objection to any arbitrator by a Party, the other Party may, when three arbitrators have been chosen under paragraph 2, object to either or both of the other arbitrators by written notice received by the other Party within fifteen days after the expiry of the period provided by the immediately preceding sentence.

4. If a Party objects to the choice of any arbitrator in accordance with paragraph 3 or if an arbitrator becomes unable to act, the parties presenting the case shall seek to agree on a replacement in writing within sixty days after receipt of the notice of objection or after the date when the arbitrator becomes unable to act.

If agreement is reached, a Party may object to the choice of a replacement by written notice received by the other Party within thirty days. If the parties presenting the case have not reached agreement, or if a Party objects to the choice of a replacement in accordance with this paragraph, the Secretary-General of the Permanent Court of Arbitration shall appoint a replacement without delay.

5. If the parties presenting the case fail to agree on three arbitrators (or an arbitrator) within the period provided by paragraph 2, three arbitrators shall, on re-

quest of a Party, be appointed without delay by the Secretary-General of the Permanent Court of Arbitration.

6. Any arbitrator appointed by the Secretary-General of the Permanent Court of Arbitration shall not be a citizen of a Party, shall have international standing and expertise, and shall have personal characteristics which place him in a neutral position with respect to the subject of the dispute. The Secretary-General shall not be open to challenge.

7. Insofar as any matter is not dealt with by Appendix 2 and other relevant provisions of this Agreement, the arbitrator or arbitrators shall, consistent with Appendix 2, be guided by the general principles of law as recognized by the Parties, which, where the case is presented by a Party or Parties means the general principles of public international law (lex lata) as recognized by the Parties.

8. The arbitrator or arbitrators shall decide where he or they shall sit and shall, in consultation with the parties presenting the case, adopt rules or procedure consistent with this Appendix.

9. The case will be presented by a Party or by its applicants involved in the conflict, at the option of the Party and each side of the case shall be represented as it sees fit.

10. A Party may intervene as of right.

11. An arbitrator may not abstain from voting on the award. If there are three arbitrators, their award shall be made by a majority vote.

12. The award of the arbitrator or arbitrators shall be rendered within one year from the date of the final appointment of the arbitrator or arbitrators unless all Parties or parties presenting the case otherwise agree or unless the arbitrator or arbitrators for good cause extend the deadline for the making of the award for one or more 30 day periods, in any case not to exceed 120 days.

The award shall be final and binding on the applicants involved in the conflict and on the Parties and shall be enforced by the Parties. The applicants involved in the conflict shall without delay file amendments to their applications consistent with the arbitral award. Within two months of the date of the award, a Party or any applicant represented in the arbitration may request an interpretation of the award. Such interpretation shall be provided within four months of the request.

13. The expense of the arbitration, including the remuneration of the arbitrators, shall be borne by the parties presenting the case. Unless the arbitrator or arbitrators determine otherwise because of the particular circumstances of the case, the parties presenting the case shall bear the expenses in equal shares.

14. If an applicant of a Party is involved in conflicts with two or more applicants of two or more States Parties to this Agreement, every effort shall be made to consolidate the arbitration proceedings.

Appendix 2

Principles for Resolution of Conflicts

1. In determining the issue as to which applicant involved in a conflict shall be awarded all or part of each area in conflict, the arbitral tribunal shall find a solution which is fair and equitable, having regard, with respect to each applicant involved in the conflict, to the following factors:

(a) The continuity and extent of activities relevant to each area in conflict and the application area of which it is a part;

(b) The date on which each applicant involved in the conflict or predecessor in interest or component organization thereof commenced activities at sea in the application area;

(c) The financial cost of activities relevant to each area in conflict and to the application area of which it is a part, measured in constant terms;

(d) The time when activities were carried out, and the quality of activities; and

(e) Such additional factors as the arbitral tribunal determines to be relevant, but excluding a consideration of the future plans of work of the applicants involved in the conflict.

2. When considering the factors specified in paragraph 1, the arbitral tribunal shall hear, and shall, except for purposes of apportionment pursuant to paragraph 3, limit its consideration to all evidence based on the activities specified in paragraph 1, which were conducted on or before January 1, 1982, provided, however, that an applicant must prove at-sea prospecting in the conflict area prior to June 28, 1980 as a pre-condition to presentation of further evidence to the arbitral tribunal regarding activities in the conflict area.

3. In making its determination, the arbitral tribunal may award the entire area in conflict to one applicant involved in the conflict, or the arbitral tribunal may apportion the area among any or all of the applicants involved in the conflict. If, after applying the provisions of paragraph 1 of this Appendix, the arbitral tribunal determines the area in conflict should be apportioned, then the arbitral tribunal shall, to the maximum extent practicable consistent with its application of those provisions, apportion the area in a manner designed to satisfy the plan of work set forth in the application of each applicant which is awarded part of the area.

U.S. SENATE,
Washington, D.C., June 28, 1982.

Hon. RONALD REAGAN,
THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The treaty text emerging from the Law of the Sea Conference falls far short of the well considered and highly defensible position you announced on January 29 of this year. It also clearly falls short of the Congressional intent expressed in Title II of the Deep Seabed Hard Mineral Resources Act. We feel you correctly instructed the U.S. Delegation to vote against adoption of the treaty text.

We understand that should the treaty nevertheless enter into force, it would establish:

A system of world government in which our political and economic interests and those of our industrial allies were not fairly represented;

A cartel for strategic ocean minerals which would freeze out nearly every American company which decided it wanted to develop the seabed;

A world-wide state owned company which would monopolize ocean mining at the direct expense of American taxpayers who would be called upon to subsidize its operations;

An economic structure built upon production controls, commodity agreements, mandatory transfer of technology and numerous other restrictions which are an anathema to our free enterprise system;

A means by which terrorist groups conceivably could be awarded financial benefits;

Sovereignty threatening precedents applicable to current and future international negotiations;

A de facto system of immediate interim application based upon the mere adoption of resolutions by conference delegates, imposing burdens upon the United States and all other participants, not only prior to the treaty's entry into force, but without the advice and consent of the Senate; and

A means by which amendments to the treaty would become binding on the United States without the advice and consent of the Senate.

You have already clearly identified other features of the treaty as well which would be inimical to U.S. interests and implicitly to those of our industrial allies.

As you know, the U.S., the United Kingdom, France and West Germany have already enacted legislation which would establish a legal framework for developing ocean minerals. These nations have already negotiated, pursuant to statutory authority, a Reciprocating States Agreement, which would provide for the harmonization and implementation of their legislation and for the resolution of any conflicts. The agreement has not yet been signed due to a hope that waiting until the conclusion of the Law of the Sea Conference on April 30 would result in an agreement on a Law of the Sea treaty text which all industrialized nations with ocean mining interests could enthusiastically sign and ratify.

Mr. President, the vote on the treaty text at the Law of Sea Conference confirms that such a prospect has decayed far beyond the point of even the most wishful thinking. We feel that the time has come for a serious rebuilding effort to begin now, based on the model of our domestic legislation and that enacted by the United Kingdom, France and West Germany. Because of the failure of the treaty to meet our national interests, you should withhold signature of the treaty; promptly sign and implement the Reciprocating States Agreement with these nations and then invite any other nation which enacts similar legislation to join with us in such agreement; and commence exploring possibilities for a more acceptable international regime.

We hope that you will see fit to follow such a course.

Respectfully yours,

Spark Matsunaga, Paul Laxalt, Strom Thurmond, Don Nickles, John P. East, Bob Dole, Paula Hawkins, Steve Symms, Jesse Helms, S. I. Hayakawa, John Warner, Orrin Hatch, Jim Abdnor, Barry Goldwater, David Boren, Bob Kasten, Larry Pressler, Roger W. Jepsen, Alphonse D'Amato, Chuck Grassley, Dick Lugar, J. Bennett Johnston, Jim McClure, Malcolm Wallop, Lloyd Bentsen, Quentin Burdick, John Melcher, Russell Long, Dennis DeConcini, and Ted Stevens.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, D.C., June 23, 1982.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: We understand that the Administration is reviewing U.S. policy on the Law of the Sea Convention and the four resolutions adopted on April 30 at the Third U.N. Conference on the Law of the Sea. Because Congress had long recognized the importance of the multilateral treaty-making process and the political, legal, and economic significance of this international negotiation, its Members have attended and closely followed each successive negotiating session and want to participate in the current policy review.

The Committee on Foreign Affairs initiated its recent hearings on U.S. foreign policy to review the results of the most recent session of this Conference. The second hearing in this series, scheduled for June 23, is to be rescheduled for July.

The United States "no" vote on the Treaty package raises critical issues concerning our nation's ability to promote and protect effectively our foreign policy and national security interests in ocean matters. Thus, we strongly believe that a thorough Congressional review of these issues is imperative and that every effort should be made to improve the Treaty prior to its final, official acceptance by the Conference.

Accordingly, we urge you to continue to participate fully in the remaining Conference sessions and to initiate and consult with foreign delegations on possible changes in the seabeds text that could serve U.S. interests. Were such changes adopted, they would improve the seabeds text of the Treaty and complement the other sections of the Treaty which the United States, through its long efforts, has been able to fashion into a form acceptable to the Administration.

At the same time, we also urge you to delay the decision on whether or not to sign the Treaty until Congress has had the opportunity to review fully the 11th session and all of the implications that the United States' not signing the Treaty could have on our foreign policy and national security interests in ocean matters.

Sincerely yours,

Clement J. Zablocki, Chairman, Benjamin A. Gilman, Joel Pritchard, Jim Leach, Lee Hamilton, Benjamin S. Rosenthal, Jonathan B. Bingham, Gerry E. Studds, Millicent Fenwick, Paul N. McCloskey, Jr., Dante B. Fascell, Hamilton Fish, Jr., Bill Frenzel, Harold C. Hollenbeck, Arlen Erdahl, Claudine Schneider, Bob Shamansky, Tom Lantos.

William F. Goodling, Stewart B. McKinney, Daniel K. Akaka, Sam Gejdenson, Mervyn M. Dymally, Dennis E. Eckart, Frank Horton, Mickey Leland, Paul Findley, Gus Yatron.

Andres Jacobs, Jr., Martin Sabo, John Conyers, Gus Savage, Bill Gray, Parren Mitchell, Howard Wolpe, Anthony Bielenson, Vic Fazio, Robert T. Matsui, Paul Simon, Louis Stokes, Les AuCoin, Cardiss Collins, Tom Harkin, James L. Oberstar, John F. Seiberling, Julian C. Dixon.

Berkley Bedell, Bob Edgar, Don Pease, Jim Jeffords, Tom Downey, Albert Gore, Jr., Matt McHugh, Don Bonker, Steve Solarz, Tom Evans, George E. Brown, Jr., David E. Bonior, Bill Brodhead, Pat Schroeder, Michael Barnes, Ronald V. Dellums.

Tom Tauke, George W. Crockett, Jr., Ray Kogovsek, Charles B. Rangel, Timothy E. Wirth, Bernard J. Dwyer, Barney Frank, Ted Weiss, Philip R. Sharp, Shirley Chisholm, Mary Rose Oakar, Leon Panetta, Richard Ottinger, Norman Mineta, Bruce Vento, Edward J. Markey, William R. Ratchford, Floyd Fithian, Peter Peyser, Fortney H. (Pete) Stark, Don Edwards, Lawrence J. DeNardis, and Carl D. Pursell.

PREPARED STATEMENT OF HON. DON YOUNG, BEFORE THE COMMITTEE ON FOREIGN AFFAIRS, HEARINGS ON LAW OF THE SEA, JUNE 17, 1982

Mr. Chairman, Members of the Committee, I appreciate the opportunity to testify before you today on a subject which I feel will have a tremendous impact on the future of the United States.

I want to make clear from the start that I am opposed to this treaty. If the United States were to even sign the treaty, much less ratify it, I think that we would be in trouble. The treaty does not protect U.S. interests in mining, oil and gas development, defense, or fisheries. If the intent of the United States is to share our wealth with less developed countries, let us do so directly with foreign aid and not through the sort of robbery that is envisioned in the New International Economic Order. Certainly, we should not subject our maritime industries to the confusion and economic disorder that will result from the United States becoming a party to this treaty.

Other witnesses today will speak of the problems presented by the treaty in the area of seabed mining, an area which has attracted the most attention in the treaty debate. As the only Representative of the great State of Alaska, a State which is adjacent to U.S. waters containing 14 percent of the world's protein resources and a State which has 35 percent of this nation's coastline, I will touch on the potential effect of the treaty on this nation's fishing industry.

Some treaty supporters contend that the treaty will have no adverse impact on the U.S. fishing industry. In fact, one letter that I received from a professor of law at the University of Washington suggested that those concerned with salmon fishing "benefit a great deal more from the LOS Treaty than from the situation without it." With all due respect to the distinguished professor, I submit that he has not paid much attention to the real world lately.

Problem areas in the treaty include those articles dealing with access to surplus fish, compulsory conciliation, and continuation of high seas fishing. I will explain each of these briefly.

Article 62 of the treaty lists those factors which a coastal State must consider when granting a foreign State access to surplus fish in the coastal State's 200 mile zone. Among these factors is the need to consider the "economic dislocation" of a foreign State's fishermen.

That's an interesting term, but what does it mean? Is it really all that important?

According to Japan, economic dislocation will result if the United States: (a) continues to follow our current policy of promoting the development of the U.S. fishing industry by releasing fishing allocations three times each year in order to insure cooperation from foreign fishermen; or (b) grants a smaller than expected allocation to a nation which the United States has determined is not cooperating with our fishing industry. As to the importance of this factor, Japan (again) has insisted that the avoidance of economic dislocation be included as part of the Governing International Fishery Agreement that is now being renegotiated between the United States and Japan. Obviously, one nation conducting a major fishery in our 200 mile zone thinks that economic dislocation is important, at least as far as that nation's fishermen are concerned.

Those of us who represent coastal States, including members of this Committee, have worked hard to insure that our fisheries resources are not given away to foreign nations in a manner detrimental to our own fishing industry. Under the treaty, the United States would have to consider foreign interests as well as our own. That idea flies in the face of the efforts that this Congress had made to develop our domestic fishing industry without subsidies and without protectionism but with the idea that these are our fish and we are going to control who gets them.

If the United States were to sign the treaty and then to neglect to consider economic dislocation, what happens? According to Article 297, a foreign State which alleges—not proves, alleges—that a coastal State has arbitrarily refused to allocate a portion of a declared surplus of fish can call for conciliation. Under Article 12 of Annex V of the treaty, the refusal of the coastal State to enter into conciliation does not constitute a bar to the proceedings. So, if Country X wants to fish in U.S. waters, and the United States says no, our fish is being held in reserve for U.S. fishermen and we are sorry but you are going to suffer economic dislocation, then Country X can allege arbitrary refusal to allocate a surplus and call for conciliation.

Treaty supporters are quick to point out that conciliation is not binding and the United States therefore does not have to accept the findings of the conciliation commission. This is correct. However, a United States refusal to comply could lead to other actions being taken by the dissatisfied foreign State. Perhaps that State would suddenly find quality problems with U.S. fish products and interfere with the im-

portation of these products. This happened to United States caught tanner crab being sent to Asia in 1976-77. Perhaps the foreign State would refuse to participate in joint ventures with U.S. fishermen. Either of these possibilities could lead to quick U.S. acceptance of the conciliation commission's recommendations. As to whether or not a foreign State would actually take such actions, I can only suggest that we consider Japanese threats of trade retaliation for U.S. actions in support of the International Whaling Commission.

Even if a foreign State did not take any sort of drastic action as mentioned above, what sort of political pressure would be put on the United States to accept the conciliation commission's findings? In the past, the U.S. State Department has been notoriously eager to trade fishing privileges for such things as the boycott of the Moscow Olympic Games. Although the present administration has refrained from trading away our fisheries resources for political gain in other areas, we have no idea what future administrations might do. Therefore, it is easy to foresee a situation where the U.S. Government, under political pressure from other States to accept a conciliation decision, will agree to let U.S. fishing interests take a back seat. It has been done before.

Thus, we could have a situation where every allocation decision made by the United States is subject to challenge if a foreign State can allege that a declared surplus has arbitrarily gone un-allocated. Each challenge can tie up the United States in conciliation proceedings. If you think that fisheries management is confusing now, what will happen if the United States signs the treaty?

Another fisheries question involves fishing for salmon on the high seas. As the Washington State members of this Committee know, the Japanese have for many years conducted a high seas salmon gillnet fishery in the Bering Sea and North Pacific Ocean. That fishery has been responsible for the loss of hundreds of thousands of U.S.-origin salmon each year.

Under existing domestic law, the United States claims jurisdiction over U.S.-origin salmon throughout their ranges, except when those fish are in the 200 mile zones of other countries. Thus, if a violation of existing salmon treaties occurs, even though that violation is in international waters, the United States can exert jurisdiction. This occurred last year when a Japanese vessel, the *Marunaka Maru #88*, was caught fishing illegally and had to be fired on by the Coast Guard before it would stop. Further, if the United States decided to exert pressure on Japan to hold down the take of U.S.-origin salmon, the United States could use the threat of decreased allocations in our 200 mile zone as a means of lowering the harvest. This tactic was used successfully in 1980 to achieve a reduction in the take of U.S.-origin salmon.

What does the treaty say? Again, we are faced with the need to consider economic dislocation of foreign fishermen who have fished on the high seas. This consideration occurs when the United States sets catch levels for salmon. Enforcement of the catch levels beyond 200 miles is only by agreement between the nations concerned. No agreement, no enforcement. Thus, we lose jurisdiction over salmon beyond 200 miles, we must depend on the cooperation of other States to enforce catch levels, and we run into difficulty terminating the high seas fishery due to the need to consider economic dislocation. Further, if we try to use the threat of withholding allocations in other fisheries, we once again run into the conciliation problem.

This treaty will be a nightmare to U.S. fishermen and processors who have worked hard to develop the U.S. fishing industry. It does nothing for us that existing domestic law cannot do and in fact can remove some of the advantages found in existing domestic law. Even if the United States were to go back to the negotiating table, as some treaty supporters have suggested, I see no evidence that the fisheries provisions of this treaty would be changed.

For those of you who may question the importance of the fishing industry in this country, let me remind you that fisheries imports account for approximately 10 percent of our balance of trade deficit. Other than oil, I know of no similar instance where a single product plays such a major role in our trade balance. If this Committee is concerned about the future of U.S. foreign policy, it had better recognize the importance of the U.S. fishing industry.

I am including with my testimony a statement I submitted for the Congressional Record on June 9th which explains in more detail the potential problems that this treaty poses for the U.S. fishing industry. I am also submitting a memorandum prepared by the National Federation of Fishermen, an organization which represents the majority of organized commercial fishermen in this country. Although NFF does not represent any fishermen's organizations in Alaska, I think that the analysis done by Lucy Sloan, the Executive Director of NFF, is worth reading. Finally, I am

including a letter from the Gulf of Mexico Fishery Management Council which expresses that group's opposition to the treaty.

Mr. Chairman, the United States has already voted against adoption of this treaty. I see no reason why the U.S. position should be changed. The time has come for the United States to stand firm against those nations that seek to rob from the rich and keep for themselves.

GULF OF MEXICO FISHERY MANAGEMENT COUNCIL,
Tampa, Fla., June 8, 1982.

Hon. RONALD REAGAN,
PRESIDENT OF THE UNITED STATES,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: For several years, the Gulf of Mexico Fishery Management Council has monitored the Third United Nations Conference on the Law of the Sea with a view toward determining the impact of a law of the sea treaty on the fisheries managed under the Magnuson Fishery Conservation and Management Act. At one point, the Council commissioned a study to compare the text of the proposed treaty and the MFCMA to determine the extent of inconsistencies in the two documents and the possible adverse impacts of such inconsistencies on domestic fisheries management.

The Council now believe that there are substantial differences of law between the treaty and the MFCMA, particularly with respect to the policies espoused in the American Fisheries Promotion Act of 1980 which amended the MFCMA.

For that reason, among others, the Council urges (1) that you continue your policy of opposition to United States participation in the law of the sea treaty, and (2) that you ensure that the United States does not sign the recently adopted treaty text at the signatory conference scheduled later this year in Caracas, Venezuela.

The Council greatly appreciates your consideration of our viewpoint on this issue.

Respectfully submitted,

B. J. PUTNAM, *Chairman.*

[From the Congressional Record, June 7, 1982]

LAW OF THE SEA TREATY MAY HURT U.S. FISHERMEN

(By Hon. Don Young of Alaska in the House of Representatives, Monday, June 7, 1982)

Mr. YOUNG of Alaska. Mr. Speaker, I have previously addressed this body on the subject of the Law of the Sea Treaty. Recently, I received a copy of a memorandum written by the executive director of the National Federation of Fishermen which discusses some of the problems that the U.S. fishing industry may face if the U.S. Government were to sign the treaty. Because I think that my colleagues would benefit from the information contained in this memorandum, I include it in the Record:

UNITED STATES AND THE UNITED NATIONS THIRD CONFERENCE ON THE LAW OF THE SEA

At the most recent session of the Third United Nations Law of the Sea Conference, the United States called for a roll call vote on whether to accept the draft treaty and then, one of four nations to do so, voted against it. Israel, Turkey, and Venezuela joined the United States in our 30 April vote. Seventeen nations abstained, including the Soviet Union and all of the Eastern Bloc but Romania, and much of the European Community. Japan, France, and Canada were among those voting to accept the treaty.

The treaty is the result of negotiations which began in 1968 with the Seabed Committee and evolved into the Third United Nations Conference on the Law of the Sea (UNCLOS III), which began in 1973. It deals not only with fisheries, but also with deep sea mining navigation, including passage through straits; protection of the marine environment; marine scientific research; and dispute settlement in the areas the treaty covers.

Why, after years of negotiation, did the United States vote "No."?

In his statement to Plenary after the vote, United States Head of Delegation James Malone said, "Despite our differences [with other nations at the Conference],

we have held to the conviction that negotiation and compromise could produce a convention serving the interests of all states. Unfortunately, in our view, the treaty before us does not meet those standards. . . . It also does not serve the broader goal of bringing the developed and developing countries together."

Malone also reminded the Conference of the six points which President Reagan stated 29 January had to be materially improved for the United States to accept the treaty. Four of these dealt directly with deep sea mining the other two, with not setting undesirable precedents for international organizations and with achieving a treaty likely to receive the advice and consent of the Senate.

Because this treaty has potentially very serious negative impacts for United States fisheries, National Federation of Fishermen worked with others in the fishing, mining, and oil and gas industries to try to ensure that, in the vote, the United States voted "No."

Where do we go from here?

An Interagency Group, under the direction of Theodore G. Kronmiller, Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State, is conducting a review of the treaty and our vote against it. IG's findings are to go to the White House on 16 June. Again, NFF is working with other ocean industry representatives to try to uphold the United States "No" vote, which would be confirmed by a Presidential decision not to sign the treaty.

The United States' rejection of this treaty is vital to the fishing industry. Theoretically, we could sign it and still refuse to ratify it. But were we to sign it, we would certainly confuse the issue, for the treaty still does not satisfy the President's 29 January objectives, nor is it likely that any further examination will make it more probable that the Senate will consent to it. And NFF's continuing review of the fisheries articles in light of emerging interpretations which foreign fishing nations operating in our zone are expounding reveals more problems, not fewer, for the United States fishing industry.

Further, were we to sign the treaty, we might find ourselves in a troublesome spot internationally. Although we are not a party to the Vienna Convention on the Law of Treaties, that convention, accepted by many and generally reflecting customary law, provides that, "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty. . . . until it shall have made its intention clear not to become a party to the treaty. . . ."

Thus, it is better that the United States continue to oppose the treaty.

Assuming IG recommends to the President that he continue to reject the treaty, and the President chooses to do so, what next?

For the fishing industry, as well as for other ocean industries, another step will be consideration of Congressman John Breaux's proposed legislation to establish for the United States an executive economic zone. Breaux plans to introduce this bill quite soon and, as Chairman of the Merchant Marine and Fisheries/Fisheries Sotte, to hold hearings on it in late July.

As well, if the United States continues to reject the treaty, we may anticipate considerable discussion about how best the United States may achieve its ocean policy goals unilaterally, bilaterally, and regionally. We tried the global approach. It failed.

Meanwhile, nations will attend the final drafting session of the treaty (theoretically for technical and conforming amendments, but also, perhaps for an occasional substantive change) in late July and August in Geneva. Then, from 22 to 24 September, the Conference will reconvene in Plenary in New York to discuss the results of the Geneva session and to plan for the December opening for signature. (Originally, the treaty was to have been signed in Caracas, where the first substantive session of the Conference took place in 1974, but because Venezuela was one of the four nations voting against the treaty, there is speculation that the signing might take place elsewhere.) The treaty will come into force when 60 nations have signed and ratified it.

For those who have not been following this exercise—and perhaps, even, for many of those who have, to one degree or another—two questions remain: First, if we assume the treaty comes into force, where does that leave the United States. Second, why did a preponderance of the 150+ nations at the Conference accept the treaty?

First, simply because the treaty comes into force does not necessarily make it customary international law. There's a common misapprehension that any majority of nations adopting or accepting a practice makes it customary international law. Not so. Customary international law is the sum of practices to implement a policy or policies which States (nations) most vitally affected employ. Thus, because the United States is a major maritime power, were we, for example, to adopt an exclu-

sive economic zone, to follow certain patterns of international navigation, to establish deep sea mining sites, our actions would contribute to the formulation of customary international law. We would not be at the mercy of 60 or more nations party to the treaty as regards what practices became customary international law. And as regards the financial resources necessary to implement certain provisions of this treaty, the United States' position may be even more telling (see the attached United Nations 1981 contributions schedule).

R. Y. Jennings, formerly a Professor of Law at Cambridge University, and now a Judge on the International Court of Justice, has discussed UNCLOS III as law-making: he said:

The task of the Third United Nations Conference on the Law of the Sea certainly includes a large and important element of codification and progressive development, but the context is noval. The subject matter of the conference comprises virtually the entire range of law of the sea, a large part of which is intended to be filled by a major effort at new law-making—not only new substantive law but a new organization and new dispute settlement machinery—the whole to be expressed in a single law of the sea treaty, the product of transaction, and, of course, some portions even of those matters which properly belong to codification and progressive development get involved in the process of negotiation and attempted transaction, not least because the preparation for the conference was committed to a political, not a juridical body.

It is, however, precisely, when frankly new law is to be made and not merely the old law developed, that some of the main limitations and pitfalls of our present international law-making process by multilateral convention become apparent. A truly legislative procedure not only makes new law but can by the same operation clear away the old. The law-making multilateral treaty, insofar as it can do this at all, can rarely do it cleanly. The result can all too easily be complication and doubt rather than clarity and certainty about the legal position. . . .

The Law of the Sea Conference is not a legislature. The most the Conference can do is to adopt a text of a treaty to be proposed to governments for signature and eventually for ratification. We do not know what the nature of the final clauses might be [this was in 1976], for that question is being considered for the first time at the present session in New York, though it is crucial. But certainly the treaty as such could only be binding upon Governments which expressed their willingness to become bound by instruments of ratification or accession. . . .

. . . in the present state of international law at least, the creation of compulsory jurisdiction depends upon the acceptance of the actual treaty obligation which creates the jurisdiction. In practical terms, there is no question here of the authority of example or the acceleration of the creation of new customary law. Nothing short of the deposit of the appropriate instrument of ratification or accession will do. . . .

Second, a majority of the nations which voted for the treaty are lesser developed countries (LDCs). The Law of the Sea Treaty embodies a doctrine called the New International Economic Order (NIEO). The basic thrust of this doctrine, adopted by the United Nations in 1974, is to coerce the transfer from the developed to the developing nations of massive financial and technological resources. One finds the most striking examples of this transfer in the treaty's deep sea mining provisions, but the fisheries articles may not be without their problems as regards NIEO.

Although deep sea minerals are a strategic resource about which one hears most discussion, fish—food—is also a strategic resource. In a world in which hunger is becoming increasingly a problem (one estimate from the United Nations; 400 million undernourished today, double that number suffer from one form or another of malnutrition), the fact that between 15 and 20 percent of the world's marine protein is within the United States 200-mile fishery conservation zone become more and more important. One United Nations publication ("A World Economy That Works," 1980), asserts, ". . . to attain world food security in the broad sense would require correcting the present imbalances in the world food situation and arriving at a new food order as an essential part of the New International Economic Order."

Nor is consideration of fish as a vital resource limited to LDCs. Both Japan (see discussion, Articles 62 and 297, below) and the Republic of Korea have sought to use the then-draft LOS treaty articles on fisheries as justification for their arguments that the United States' new model Governing International Fishery Agreement was somehow contrary to customary international law because it outlines various advantages which must accrue to the United States and its fishing industry in exchange for a foreign nation's privilege to fish in the United States' fishery conservation zone. This is one of the more recent reasons why NFF opposes the United States' becoming a party to the Law of the Sea Treaty.

Because the United States fishing industry is made up of diverse fisheries, different articles will be more important than others in different areas. Briefly, for discussion below, we have problems with the following groups of Articles:

(1) Articles 62 and 297, complicated by Articles 70 and 72, 300, and Article 12 in Annex V, Section 2; these Articles—very ambiguously—deal with a coastal State's rights and duties in the exclusive economic zone, including allocation of surplus to other States, and with the compulsory conciliation which may result if a coastal State elects not to allocate its surplus;

(2) Articles 56, 63, 66, 116, 117, 118, and 119 would adversely impact the United States positions on salmon, both within the 200-mile zone and on the high seas;

(3) Article 64, and possibly Articles 70 and 72, would undermine our juridical positions on both tuna and billfish; and

(4) Articles 70 and 72 deal with possible allocations to LDCs in a subregion or region; they could further complicate both our domestic allocations process and our efforts to see balanced international management of tuna.

As I said, different Articles will be more important than others in different areas. However, the first two in group (1), and read in the context of several of the others, are potentially troublesome to many United States fisheries which are or may be under the management authority of one of the Regional Fishery Management Councils.

Article 62, Utilization of Living Resources, and Article 297, Limitations on Applicability of Section 2 (Section 2 is Compulsory Procedures Entailing Binding Decisions), could seriously jeopardize the Councils' statutory responsibility to make optimum yield (OY) determinations. Although Article 61, Conservation of the Living Resources, provides that "the coastal State shall determine the allowable catch of the living resources in its [200-mile] exclusive economic zone." Article 62 elaborates the coastal State's rights, jurisdictions and duties as regards these resources, over which Article 56 gives it sovereign rights. Article 62(1) says the "coastal State shall promote the objective of *optimum utilization* [undefined]. . . ." Article 62(2) says the coastal State shall determine its capacity to harvest the fish in the EEZ, and where it does not have the capacity to harvest all of the allowable catch, it "shall give other States access to the *surplus* [undefined] of the allowable catch" under certain agreed-upon conditions. Article 62(3) lists relevent factors the coastal State shall consider in giving other States access, including ". . . the need to minimize economic dislocation of States whose nationals have habitually fished in the zone. . . ." (All italics and brackets are my emphasis and comments.)

When one considers these articles, even more general and imprecise than some of the provisions in the Magnuson Fishery Conservation and Management Act are alleged to be, one wonders how United States fisheries would fare. After all, it has been a policy decision—and interpretation—that we allocate access to fish to foreigners if the United States fishermen will not harvest these. It is only inferred from, not stated in, the MFCMA. And with the 1980 amendments to the criteria for determining allocations of the total allowable level of foreign fishing in the American Fisheries Promotion Act, combined with this Administration's much more aggressively pro-industry policy, we certainly are better off under the MFCMA as it's written than we would be under Article 62.

A talking paper on the model Governing International Fishery Agreement, which the Government of Japan submitted to the Department of State in February, reinforces this. At various points in the 21-page memo Japan cited conflicts between the model GIFA and what they called Draft Convention on the Law of the Sea (DCLS), the new GIFA deletes a paragraph in the present agreement on international developments on the law of the sea. The Japanese argue it should be maintained [sic]: "The basic principle contained in the Draft Convention on the Law of the Sea (DCLS) has been the international guideline for conserving and managing fishery resources in 200-mile zones. Therefore, it should be clearly stated in the new Agreement that Japan and the United States are, in the course of the negotiations for the new Agreement, cognizant of the relevant provisions of DCLS. . . ." This, they argue later in the memo, includes using *optimum utilization* and acknowledging the need to minimize economic dislocation.

Then, in a cable in late May, the Government of Japan argued strongly against the new 50 percent holdback allocation system, stating, among other points. ". . . Further, it cannot be helped but saying that such measures taken by the *United States ignoring the necessity of minimizing economic disclocation* of Japan are against the spirit of the Japan-United States fisheries agreement." [Statement from cable as received, including italics for emphasis.]

And if the ambiguities in Article 62 weren't enough, we have the apparent confusion among various of the provisions in Article 297(3)(a) and 297(3)(b). Article 207(a)

says. ". . . the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, *allocation of surpluses to other States* [undefined] and the *terms and conditions established in its conservation and management laws and regulations* [undefined]." (All italics and brackets are my emphasis and comments.)

While that sounds reasonably straightforward as it stands, it becomes considerably less so when one reads Article 297(3)(b)(iii); "Where no settlement has been reached by recourse to Section 1 of this Part [Article 279ff deal with the obligation of States Parties to settle disputes by peaceful means] a dispute shall be submitted to conciliation under Annex V [Conciliation], Section 2 [Compulsory Submission to Conciliation Procedure Pursuant to Section 3 of Part XV [Settlement of Disputes]], at the request of any party to the dispute, when it is alleged that: . . . (iii) a coastal State has arbitrarily [undefined] refused to allocate to any State, under Articles 62, 69, and 70 and under terms and conditions established by the coastal State consistent with the Convention, the whole or part of the surplus it has declared to exist."

The threat to Councils' OY determinations, and thus to the entire fishery management plan (FMP) process, could work like this: Suppose a Council determined that OY=10,000 MT, and that the domestic annual harvest (DAH)=6,500 MT, but that because of the potential for DAH to grow, either through joint ventures or through increased United States processing capacity, the balance of the 10,000 MT is not surplus, but rather, reserve. This is the policy we now practice. To complicate the issue further, suppose some international fisheries body decides that the maximum sustainable yield (MSY) of this stock is 12,500 MT.

One looks at the word, "arbitrarily," in Article 297(3)(b)(iii), a word which appears with some regularity, with the clear implication that a coastal State mustn't behave so, and then one goes to Article 300, Good Faith and Abuse of Rights, which says, "The States Parties to the Convention undertake to discharge in good faith the obligations entered into in conformity with the Convention, and to exercise the rights, jurisdictions, and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

And finally, completely to confuse the issue, Annex V, Section 2, Article 12 says, "(1) Any party to a dispute which, in accordance with Part XV, Section 3, may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute. (2) Any party to the dispute, notified under paragraph 1, shall be obliged to submit to such proceeding."

Professor William Burke, School of Law, University of Washington, also makes our point—unintentionally, I'm reasonably sure, and as a scholar, not as one directly involved in U.S. fisheries policies and their impacts on the United States fishing industry. He addresses the ambiguities of these Articles in a May 1982 communication of Congressman Don Young: ". . . Clearly measures reasonably designed to promote the local harvesting industry are not inconsistent with the Convention and adoption and implementation of such measures would not constitute an 'arbitrary refusal to allocate' such that there would be even a colorable, let alone insubstantial, basis to invoke the conciliation process . . . even if all the above were incorrect and the conciliation process were engaged, the commission cannot substitute its discretion for that of the coastal State and it is expressly provided that the powers to allocate surpluses and to set terms and conditions are discretionary." [I'm not sure that ". . . [coastal State] shall, through other agreements or arrangements . . . give other States access to the surplus . . ." is discretionary.]

And he continues, "If, on the other hand, the 'delayed release policy' used by the United States were an arbitrary refusal to allocate within the meaning of CLOS *then it is of course quite appropriate that some remedial action be undertaken by the injured nations.*" [My emphasis.]

Under a series of complex, interlocking provisions in the treaty, then, nation X could take us to compulsory conciliation—and when one reflects on the Japanese and Korean approaches to the GIFA negotiations, I don't think it's unreasonable to think nation X, Y, or Z might. Compulsory conciliation is a process in which, given the contemporary political climate, I very much doubt we would win. With all this, I don't see how we could even begin to be comfortable that any OY determination which included a reserve wouldn't risk being hauled into conciliation. At a minimum our administration of the MFCMA would encounter delays, as bureaucrats argued that implementation of challenged plans should await the outcome of conciliation proceedings. Moreover, the tendency to play it safe would lead to a less-than-

vigorous pursuit of United States fisheries interests for fear of expensive and potentially embarrassing conciliation actions.

Salmon next. Articles 56, 63, 66, 116, 117, 118, and 119 deal with salmon or salmon fishing, and in doing so, are considerably less strong for the coastal State than is the MFCMA for salmon management. Article 56 gives the United States jurisdiction over salmon, but only in the EEZ, not to the extents of their ranges (outside recognized foreign zones), as the MFCMA does. And Article 56(2) requires due regard for the rights of other States.

Article 63 deals with stocks in the EEZs of two or more coastal States or both within the EEZ and the high seas beyond but adjacent to the EEZs. It calls for appropriate subregional or regional cooperation—which we already have, under the International North Pacific Fisheries Commission and the Fraser River Compact—to ensure conservation and development of these stocks on the adjacent high seas.

Article 66, with Article 56, is where one really begins to see the potential discrepancies between the treaty and the MFCMA. Although the coastal State does have primary interest in and responsibility for the stocks, it may only establish allowable catches after consultation with those other States which have fished the high seas anadromous stocks or through whose waters the stocks pass from the State of origin to the high seas. In the case of United States West Coast or Alaska salmon, this means Japan in the first instance, Canada in the second. Further, fishing for salmon is to be conducted landward of 200 miles, except where that would result in economic dislocation for a State other than the State or origin, something which the State of origin must seek to minimize.

States other than the State of origin are to participate in measures to renew the salmon, especially through expenditures for this purpose, but in return, the State of origin must give the contributing State special consideration for access to stocks originating in its rivers. Finally, the State of origin and other States must arrange to implement these provisions, where appropriate, through regional organizations.

Now, contrast all that with what we have under the MFCMA: jurisdiction over salmon to the extents of their ranges, except when they are in the waters of other nations and on-going regional arrangements through INPFC and the Fraser River Compact. Not only do we not gain for salmon if we become a party to the treaty, but we may also acquire greater responsibilities and fewer fish, especially since States other than the States of origin are to be consulted, with a view to agreeing. And if they don't? As well, bear in mind we could reduce our current negotiation leverage in INPFC which the option of allocating FCZ resources for salmon not taken on the high seas represents.

It only gets more discouraging as one goes through Articles 116 through 119, those which deal with conservation and management of the living resources of the high seas. The final frustration is Article 119(3), the last paragraph of these articles. It reads, "States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State." So much for the MFCMA's jurisdiction over salmon to the extents of their high seas ranges and its preference for allocation of the resource to United States fishermen.

Article 64 deals with highly migratory species, including tuna and billfish. Article 64(1) calls for international cooperation to ensure conservation and optimum utilization throughout the region, both within and beyond the EEZ. Further, if not such mechanism exists, the coastal State and other States which fish in the region shall establish one. And, to establish conclusively that this Article is at odds with our juridical position, Article 64(2) states that, "The provisions of paragraph 1 apply in addition to other provisions of this Part." For that, read coastal State jurisdiction over tuna, under Article 56. Further, were we to accept the treaty we would undermine the twin pillars of support for effective tuna management and for our distant water tuna fishing industry—the embargo provisions of the MFCMA and the seizure, compensation provisions of the Fishermen's Protective Act.

But, to make the issue more complicated for the United States industry, under the MFCMA, we do have jurisdiction over billfish, and we are managing them. For that fishery, if we were to accept the treaty, we would be obliged to establish some new international mechanism for billfish management. Further confusion, with no gain to the United States. We would hurt both ways: in the tuna fishery and in the billfish fishery.

The last two articles of considerable concern are Articles 70 and 72, they deal with the rights of States with special geographic characteristics and the restrictions on transfer of rights under Articles 69 and 70.

It's difficult to anticipate what, precisely, might be the range of problems we would have with these Articles. Their NIEO flavour is unmistakable. That alone is

reason to view them with caution. Article 70(3) does address taking into account, among other points, "the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State." But Article 70(4), although it does refer to Article 70(3) deals with the coastal State's responsibility to allow for participation in the coastal State's fisheries of developing States in the region or subregion with special geographic characteristics.

Article 72 reminds me that already we have had a pollock allocation off Alaska to the Mexicans go from them to the Koreans, and a similar situation with hake off the West Coast. I can foresee a situation where, under Article 70(4), the "region" of the United States could be required to allocate fish to an LDC instead of to a European, Asian, or even African country from which the United States industry might derive greater benefit. NIEO.

To conclude, I think the Law of the Sea Treaty is the best benchmark we in the United States fishing industry have had against which to measure the considerable progress we have made because of the Magnuson Fishery Conservation and Management Act. Many too many times in the last six years it has seemed to fishermen all over the country that we have gone nowhere, or even behind, with the MFCMA. With the spectre of having to work under the treaty, I think our potential under the MFCMA becomes much clearer. It may be far from perfect, but is is considerably better than what the Law of the Sea treaty offers

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NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Washington, D.C., April 23, 1982.

Hon. RONALD REAGAN,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: We, as representatives of the undersigned American business organization, wish to take this opportunity to jointly express our concerns to you regarding the treaty being developed in the Third United Nations Conference on Law of the Sea.

On January 29, 1982 you issued a statement formally setting out your views on the Law of the Sea Conference, and stipulating six areas in which the draft treaty would need to be materially improved to be acceptable to the United States. Specifically, you said the United States would seek changes during the current session of the conference to achieve a treaty which:

Will not deter development of any deep seabed mineral resources to meet national and world demand;

Will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;

Will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;

Will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

Will not set other undesirable precedents for international organizations; and

Will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

Mr. President, we entirely agree with your position on the draft treaty. We believe that a suitably improved comprehensive treaty on Law of the Sea would be in the national interest, and would also serve the interests of American business. But we believe the treaty, to be sufficiently improved, must reflect significant improvements in each and every one of the six areas you have identified. We also note that industry has a number of concerns with aspects of the draft treaty not covered in your January 29 statement, particularly in relation to offshore petroleum and fisheries development.

Our concern at this time stems from the various sets of proposed treaty amendments which have been offered for consideration in the current session of negotiations in New York. Each set of amendments, including those offered by the U.S. Delegation on April 13, appears to fall far short of your stated objectives. Comparing the amendments offered by the U.S. Delegation to the six points you have identified, it is clear, even if all of those amendments were accepted as written:

The resulting treaty would deter development of deep seabed minerals, for a number of reasons including production limitations and mandatory technology transfer;

The resulting treaty would not assure national access to seabed minerals or enhance U.S. security of supply;

The resulting treaty would not clearly provide the United States a decision-making role in the deep seabed regime; it would essentially establish a forum for the sort of "Global Negotiations" toward a "New International Economic Order" you so properly rejected during the North-South Economic Summit in Cancun last October;

The resulting treaty would establish a number of undesirable precedents for international organizations, in the areas of technology transfer, production limitations for other resources, and one-nation one-vote governance of significant sectors of the world economy; and

The resulting treaty would almost certainly fail to receive the Senate's consent to U.S. ratification, since it would continue to include various philosophically and substantively objectionable provisions, as noted above.

It is noteworthy that at least one precedential effect of the current negotiations has already been identified, in the context of talks between the United States and Japan directed to renegotiation of the Governing International Fisheries Agreement (GIFA) under which Japanese fishermen are permitted to operate in the United States' fishery conservation zone. Japan has proposed major revisions of the GIFA which are inconsistent with U.S. law, and has attempted to justify its position in this respect by explicit reference to the draft Law of the Sea Treaty.

We respectfully urge you not to withdraw from your present strong position on the Law of the Sea Treaty, and to examine any agreement reached at the conference with great care before you make a decision regarding United States signature to, or ratification of, that agreement. We would be pleased to meet with you or your staff, to discuss our concerns and respond to any questions you may have.

Thank you for your consideration of our views.

Sincerely yours,

Charles D. Matthews, President, National Ocean Industries Association; Richard M. Hunt, For the Petroleum Equipment Suppliers Association; Lucy Sloan, Executive Director, National Federation of Fishermen; M. Kathryn Nordstrom, Washington Representative, Pacific Seafood Processors Association; Charles F. Darden, President, International Association of Geophysical Contractors; J. Kenneth Smith, Assistant Director, Government Relations, Sun Co., Inc.; Stephen T. DeLaMater, Vice President, Government Relations, Halliburton Co.; James C. Hunter, Director, Federal Affairs, Cities Service Co.; Alexander B. Trowbridge, President, National Association of Manufacturers; Lee J. Weddig, Executive Vice President, National Fisheries Institute, Inc.; Donald W. Banner, Esq., President, Intellectual Property Owners, Inc.; Richard J. Greenwald, General Counsel, Ocean Mining Associates; C. R. Palmer, President, International Association of Drilling Contractors; Don R. Duncan, Federal Relations Representative, Phillips Petroleum Co.; Theron J. Rice, General Manager, Washington Office, Conoco, Inc.

[From the Congressional Record, June 9, 1982]

Problems With Law of the Sea: A Further Analysis

(By Hon. Don. Young of Alaska in the House of Representatives Wednesday, June 9, 1982)

Mr. Young of Alaska. Mr. Speaker, on April 21, 1982, I pointed out to the Members of this body some of the problems that the U.S. fishing industry might face if

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Note.—Certain statements in the previous analysis require technical clarification so that there is no misunderstanding. The exclusive economic zone (EEZ) which would be established by the treaty "corresponds" to the Fishery Conservation Zone (FCZ) established by the Magnuson Fishery Conservation and Management Act (MFCMA) in the sense that fishery management authority within 200 nautical miles of the base line is provided to each adjacent coastal State under the treaty and to the United States under the MFCMA. The language in article 59 of the treaty has a bearing on dispute settlement involving fisheries issues to the extent that unantici-

Continued

the Law of the Sea Treaty were signed by the United States. The potential effect of the treaty on the fishing industry has not received a great deal of attention, partially because those who reviewed the fisheries sections of the treaty for the U.S. Government prior to the latest negotiating sessions refused to consult with the fishing industry.

Since my April statement, the Third United Nations Conference on the Law of the Sea agreed to adopt a draft treaty by a vote of 130 to 4, with 17 nations abstaining. The United States, which called for the rollcall vote, was one of the four nations voting against adoption.

While I applaud the President's decision to vote against adoption. I am concerned about continued attempts by treaty supporters to press for eventual U.S. acceptance of the treaty. My colleagues should note that the opinions of some of these supporters, many of whom possess impeccable academic credentials, may be somewhat influenced by the professional relationships that these individuals have maintained with groups in countries that voted in favor of adoption of the treaty. The treaty will be open for signature in December. If the United States were to reverse its position, this could cause serious problems for our Nation.

Because the treaty is now being reviewed by the U.S. Government, I am presenting a further analysis of the potential impacts of the treaty on the U.S. fishing industry so that my colleagues can consider the serious implications of U.S. approval of the treaty.

LAW OF THE SEA AND U.S. FISHERIES MANAGEMENT

It is difficult to analyze the treaty because of the lack of a clear legislative history and the use of terms which are not defined within the body of the treaty. In many cases, arguments could be made which could result in opposing or conflicting conclusions. Therefore, any analysis of the treaty must consider U.S. and foreign governments' positions, past U.S. fisheries policy, and the existing political climate, both foreign and domestic.

Fisheries management in the FCZ is based on the policies, purposes, and statutory requirements of the MFCMA. The law recognizes the need for conservation and management of fish stocks; provides a clear distinction between domestic and foreign fishing; defines management tools to be used; and establishes a system to manage both foreign and domestic fishing.

Recent U.S. fisheries policy has been to promote the development of the U.S. fishing industry and to manage fisheries within the FCZ in ways which will achieve this goal. To emphasize the goal of full development of the U.S. fishing industry, the Congress enacted the American Fisheries Promotion Act which, among other things, expanded the list of criteria which the Secretary of State must use when granting fishing privileges to foreign nations which seek to fish in the U.S. FCZ. These criteria reflect the goal of full development of the U.S. fishing industry by conditioning allocations on such things as purchase of processed fish products, the establishment of joint ventures with U.S. fishermen, transfer of fishing technology, and cooperation in research. These criteria are also included in the new Governing International Fishery Agreements (GIFA's) which are being negotiated by the U.S. Government.

The State Department has also recently changed the way in which allocations are released to foreign fishermen. Before 1982, Foreign nations received their allocations at the beginning of each year. The U.S. Government has interpreted both the MFCMA and the existing GIFA's to preclude taking back fishing privileges once we have granted these privileges. Thus, if country X demonstrated a lack of cooperation with U.S fishermen by, for example, not honoring its promises to engage in joint ventures, the U.S. Government had little leverage with which to induce cooperation that year. In 1982, the State Department adopted a new allocation policy which called for the release of allocations three times each year. This provides the U.S. Government with necessary additional leverage with which to develop U.S. fisheries.

However, were the United States to accept the treaty, we would be required to accept additional factors to consider before we granted allocations. Among other things, we would be required to take into account the need to minimize economic dislocation in States whose nationals have habitually fished in the zone. While this is only one factor to be considered and need not be the factor which determines who

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pated ocean uses may impact them. In addition, a coastal State's refusal to grant another State access to surplus fish does lead to compulsory conciliation, although not automatically; the conciliation process is available if another State were to challenge the coastal State's refusal.

gets what fish, Japan has already used the economic dislocation argument to protest both the new allocation policy and an allocation reduction the United States made in conformance with the MFCMA allocation criteria:

The Japan Fisheries Agency on March 23, 1982, stated that the three-step allocation system will be damaging to operational efficiency of the Japanese fishing fleet;

In a letter to Secretary of State Alexander Haig on April 30, 1982, the Honorable Yoshio Okawara, Ambassador of Japan, said: "Japan deeply regrets such a drastic reduction of catch quota because of its tremendous adverse impact upon the Japanese fishing industry . . . the delay of the allocation already resulted in serious dislocation among Japanese fleets . . .";

The Japan Fisheries Association, a Japanese fishing industry group, used the economic dislocation argument in its protest about the second 1982 allocation, stressing that the allocation was smaller than Japan expected.

Not surprisingly, Japan is pressing hard for us to include the economic dislocation test in its renegotiated GIFA. The test is already in the existing GIFA, although not in U.S. law—a damaging incongruity that should not be perpetuated or repeated elsewhere.

Under the MFCMA, a nation dissatisfied with the allocation it receives may either keep fishing until its allocation runs out or stop fishing immediately in the FCZ. In either case, it is still possible for that nation to receive a larger allocation in the future if it complies with the allocation criteria U.S. law outlines. Under the treaty, a State which were to allege that the United States had arbitrarily—a word which is not defined in the proposed treaty—refused to allocate the whole or any part of any declared surplus—that is, those fish which U.S. fishermen will not catch—could take the United States to conciliation. Conciliation by its nature is nonbinding and in no case can the conciliation commission substitute its discretion for that of the coastal State. However, a State's refusal to enter into conciliation shall not constitute a bar to conciliation proceedings. This could allow a State—for example, Japan—which has said it considers that the United States is ignoring alleged economic dislocation of the Japanese fishing fleet by reducing Japan's allocation—a result of implementing the policy to benefit the U.S. fishing industry—to call for conciliation in every instance where Japan did not get all the fish which it thought it deserved.

Under the treaty, then, the United States might face sufficient challenges to our new development-oriented fisheries policy to cause the executive branch to reconsider its aggressive implementation of this policy to avoid spending all of its time before a conciliation commission. Worse still, as a matter of "good faith" or out of fear of damaged relations, the United States might act to accommodate foreign interests, pending conclusion of the proceedings. Even if the United States continued to take a pro-development position, a dissatisfied State could decide to take other actions to influence a change in policy. Among these might be interfering with the importation of U.S. fish products into that State, or withdrawing from joint venture arrangements with U.S. fishermen. Many States are now using similar economic measures to support foreign policy objectives.

The treaty also requires a coastal State to seek to minimize economic dislocation in anadromous species fisheries. Under the MFCMA, the United States asserts management authority over U.S.-origin anadromous fish throughout their ranges, except where fish are found within the 200-mile zones of other nations. Although under the treaty the United States could establish harvest levels for anadromous fish, there is no mechanism by which the United States might enforce those harvest levels outside of our EEZ. Further, we would probably have to accept other States' fishing for U.S.-origin anadromous species outside of our EEZ where to prohibit it could result in economic dislocation for a State other than the United States. This freedom for other States to fish for anadromous species on the high seas is only ameliorated somewhat by the requirement that States consult and enter into cooperative agreements for the renewal of stocks (including the expenditure of funds by States other than the State of origin for such purpose) and the terms and conditions of fishing. Enforcement of regulations would be by agreement between the State of origin and other States concerned.

Again, under the treaty, we would be forced to assess the relative weight of the need to minimize dislocation for other fishing States as a factor which we would have to consider in managing fisheries. If the Unted States were to set a harvest level equal to the domestic catch of salmon, Japan, for example, which now conducts a high seas gillnet fishery for salmon, could argue that the United States was ignoring the economic dislocation that could result in the Japanese salmon fleet. If this were to lead to no agreement between the United States and Japan on the level of high seas fishing, then neither would any enforcement mechanism exist. If the

United States were to use allocations for other species within the EEZ as a lever to induce cooperation (as the United States did in 1973, by way of threat, to force a decrease in the existing high seas fishery), then the United States could use the conciliation process. Under the treaty, the simplest course of action of the United States might be to continue to allow a high seas salmon fishery.

We should also be aware that even if the United States were only to sign, not ratify, the treaty, we could still find ourselves with problems. For example, section 201(e)(1)(H) of the MFCMA allows the Secretary of State to consider other matters as he deems appropriate when he makes allocations. He could choose to consider the need to minimize economic dislocation as such a matter.

One cannot say for certain that the Secretary would use this criterion. However, we must be aware of the possibility in view of past U.S. Government actions:

In 1980, Japan received an extra allocation of 200,000 metric tons of fish when the United States was seeking support for its boycott of the Moscow Olympic Games. That same year, the U.S. Coast Guard seized 11 Japanese fishing vessels for violating the MFCMA, a noncompliance record that no other nation has duplicated.

In 1977 and 1978, Mexico received allocations of bottomfish in the FCZ off Washington, Oregon, California, and Alaska, despite its lack of a historical fishing record for those species. Mexican vessels did not catch these quotas; Korean vessels did under joint venture arrangements, thus causing market access problems for the United States.

Since 1980, we have denied the Soviet Union an allocation, despite considerable Soviet cooperation with U.S. fishermen.

The so-called fish and chips policy (trading fishing privileges for cooperation with the U.S. fishing industry) has helped to minimize the use of allocations for nonfisheries-related matters; however, the potential for nonfisheries use remains, and supporters of the fishing industry in the Congress and the executive branch have often had to fight to make existing domestic fisheries policy work in spite of challenges from elements of the U.S. State Department.

Thus, the treaty presents potential problems for the U.S. fishing industry by expressly requiring consideration of factors sympathetic to foreign fishermen in the granting of access to fishery resources off the United States and by providing a mechanism which dissatisfied nations could use to challenge U.S. fishery management decisions. The U.S. initial opposition to adopting the treaty supports the U.S. fishing industry. A change in our position could present serious difficulties for U.S. fishermen and processors who are seeking full development of the U.S. fishing industry.

[From Atlantic, October 1982]

WASHINGTON—OUTSIDE THE MAINSTREAM

Reagan's refusal to sign the Law of the Sea Treaty may make vital navigation rights hard to obtain in the future

A new mutation of American isolationism has prevented this country from joining a major international organization we helped to create. President Reagan's announcement, in July, that the United States would not sign the Law of the Sea Treaty seems an extravagant expenditure of U.S. political capital. Viewing the treaty's system for mining the seabed as a form of supranational socialism, the Reagan Administration rejected negotiation in favor of an adamant assertion of free-enterprise rights. As a consequence, all U.S.-based corporations have effectively been excluded from seabed mining. Moreover, if the United States persists in its refusal to sign, the world's largest maritime power may also find its navigation rights repeatedly challenged.

Simply put, the Law of the Sea Treaty, negotiated over fifteen years by 154 nations, sets forth a constitution for the oceans. Its more than 300 provisions cover all presently conceivable peaceful uses of the seas, including fishing, navigation, scientific research, and deep-sea mining.

In essence, the treaty seeks to balance a vast array of interests through two major compromises. It sanctions enlarged national control over coastal waters while also protecting the rights of those passing through these waters. On the question of seabed mining, the treaty attempts to accommodate both Third World hopes for a lien on international resources and Western resistance to multinational codes limiting private enterprise.

Territorial waters for coastal states will now be extended from three to twelve miles, and these states will be assured of title to all fish and mineral resources in a 200-mile "exclusive economic zone." At the same time, a new right of "transit passage," allowing free movement of submerged submarines and overflight of aircraft, assures unimpeded navigation by other states. This is important for maintaining passage through straits less then twenty-four miles-wide, such as Gibraltar, Hormuz, Malacca, and even Dover.

Because both the United States and the Soviet Union viewed freedom of the seas as primary, the conference hammered out the compromises on navigation early—by 1976. On seabed mining, however, negotiations were more protracted. For the West and the Third World, the stakes were as much political as economic. Most of the ocean's riches, including virtually all accessible petroleum reserves and up to about 90 percent of fish stocks, have now been appropriated in the 200-mile zones.

Beyond the 200-mile limits, and miles beneath the ocean's surface, lie dense beds of potato-sized metal nodules, the residue of volcanic eruptions millions of years in the past. While these nodules of manganese, cobalt, copper, and nickel may eventually be worth hundreds of millions of dollars, Commerce Department and industry sources estimate that the market value of manganese, cobalt, copper; and nickel will not justify, until the 1990s or later, the $1.5 to $1.8 billion investment required for each mining site.

The industrialized countries and the Third World, nonetheless, differed pointedly on the issue of control: who will mine the seabed? While Western economics ministries wanted an agency that would merely sort out conflicting claims and issue mining licenses, the developing countries demanded an international Seabed Authority with full power to exploit the seabed.

The compromise embodied in the treaty does not perfectly serve U.S. interests. Proposed in outline by Henry Kissinger in 1976, the seabed-mining system shares access to seabed mine sites between individual operators and an internationally run company called the Enterprise. The seabed regime will limit production and the Third World will exercise a good deal of control over it. Neither the United States nor its allies would have been likely to endorse such an arrangement had it not been part of a package deal including navigation. As everyone involved in the negotiations for any length of time agrees, however, without such a seabed regime no treaty could have won acceptance by the Third World.

The Reagan Administration took office just before the scheduled final session of the conference believing it could prevent a Third World sea grab. Though mandated by the 1980 Republican platform to toughen up the U.S. negotiating position, Reagan appointees were uncertain whether the treaty could be improved, and some thought it should be scrapped, on grounds that it would inevitably compromise American principles.

Among those who favored improving the treaty were, reportedly, Secretary of State Alexander Haig and officials of the Departments of Transportation and Commerce. Because the Law of the Sea negotiations never ranked as a "front-burner" problem, however, a handful of committed ideologues among the middle-level bureaucrats, enthusiastically supported by presidential counselor Edwin Meese, were permitted to run with the issue. Theodore G. Kronmiller, the deputy assistant secretary of state for oceans and fisheries affairs, led the anti-treaty phalanx. Kronmiller's appointment fits this administration's pattern of sending the fox to tend the chicken coop. Kronmiller had argued in 1980 in a two-volume study of the legality of deep-sea mining that "an impasse of a profoundly ideological nature appears likely to preclude the successful conclusion of a widely acceptable treaty establishing a new regime for the deep seabed."

At the Defense Department, the new civilian appointees, led by John Lehman, the Secretary of the Navy, and Fred Ikle, the undersecretary of defense for policy, executed a 180° turn in the department's position, downplaying its previous strong endorsement of the navigation provisions as essential to U.S. security, and giving priority instead to "strategically essential" seabed minerals.

Before and during the conference, in fighting between opponents and proponents produced some confusion concerning the U.S. position. Debate on the level of U.S. interests—involving production limits, technology transfer, U.S. leverage in decision-making—often masked frankly ideological opposition.

Secretary Lehman expressed the administration's impatience when he declared, prior to the session, that "perhaps the American people have tired of their long years of sacrificing U.S. national goals and interests for the greater supranational interests of the world's community of nations." President Reagan reiterated his administration's commitment to free enterprise just before the summit meeting on Third World development held at Cancun a year ago. He explained that "free

people build free markets that ignite dynamic development for everyone. And that's the key . . . it's a question of freedom versus complusion, of what works versus what doesn't work, of sense versus nonsense."

Many observers doubted, as the 1982 session approached, that the Americans would return to the conference, and, according to an official of the State Department's Office of Ocean Law and Policy, the same doubt reigned within the administration. At almost the eleventh hour, however, treaty proponents won the first round. And just one month before the start of the preliminary negotiations, President Reagan announced that the United States would return to negotiate on six pragmatic-sounding objectives.

Arriving at the Law of the Sea Conference, the Reagan appointees faced serious obstacles. Many of the LOS delegates had been laboring together over the treaty for years, falling in and out of a variety of coalitions, as colleagues and friendly adversaries, members of a select group of cognoscenti on a very arcane subject indeed.

Old conference hands saw the treaty as the result of a historical process, as the product of remembered tradeoffs, pressures, gains, and losses. While the Americans came determined to resist Third World encroachment, many in the Third World caucus, the Group of 77, described the conference as nine years of U.S. pressure during which the Group moved back, inch by inch, until the Americans achieved almost all they were out to get. Ambassador Hasjim Djalal of Indonesia points out that his country (like most of the other Third World states) compromised a firm initial commitment to an international seabed monopoly. But then the Americans wanted more. "Every year," he says, "we came to the conference wondering what new changes the United States wanted and which ones they would insist on."

Given the treaty's evolution—in accretions of oral history, written down, revised again through protracted ongoing conversations, and again recorded—the Reagan approach struck many as an attempt to turn the clock back to 1973, nullifying the prodigious expenditure of effort and ingenuity that had produced what many regarded as a nearly finished product by the end of 1980. At the beginning of the 1981 session of the conference, when the administration asked for a postponement in order to conduct a total review of the treaty, many delegates expressed disbelief and sharp frustration.

As the delegates returned to the conference last February, they labored under considerable confusion about U.S. intentions. Apparently, a similar uncertainty afflicted the American delegation. Leigh S. Ratiner, former deputy chairman of the U.S. delegation to the 1982 session, reported in this summer's issue of *Foreign Affairs* that the U.S. delegation did not receive detailed instructions on the President's objectives until the opening day, March 8, long after preliminary negotiations had begun, and less than two months before the scheduled end of the nine-year conference. Moreover, the instructions, negotiated exhaustively among various factions, held the delegation to a considerably more restrictive interpretation of the objectives than seemed implied in the President's statement of them.

In the bureaucratic tug-of-war, Washington-based opponents easily outmaneuvered the proponents, many of whom were in New York trying to get a handle on what to negotiate. Robert Keating, a Defense Department consultant, reportedly added to the confusion in New York when he doubled as U.S. delegate and anti-treaty lobbyist. According to *Barron's* magazine, Keating took time off in mid-April to organize a seabed-miners' march on the White House. The miners sought and obtained from Edwin Meese reassurance that the U.S. would not compromise.

In preparation for a complicated negotiation that would end April 30, the U.S. delegation on February 24 circulated a long paper sketching all the U.S. problems and suggesting a wide variety of solutions. Pressed to put their proposals in specific treaty language, on March 19, the U.S. delegation produced a sixty-eight-page booklet with a splendid green cover which proposed amendments to more than half the seabed provisions. As a negotiating tool, the "green book" bombed. "Nobody took it seriously," according to Dennis Francis, a Jamaican delegate, who observed that "the problem with the Americans was they were never in a position to reveal their bottom line." Finally, on April 13, a streamlined twenty-four-page set of formal amendments emerged. By that time the negotiating was effectively over.

Strangely enough, before this session no one seems to have seriously considered the possibility of a Law of the Sea regime that did not include the United States. Throughout the long years of negotiating, the deepest fear of sea-law advocates was that no treaty would ever emerge. The treaty's staunch opponents in the administration, on the other hand, apparently assumed that America's European allies would not join the regime without the U.S. Arguing that seabed mining should be considered one of the traditional freedoms of the sea, they counted on the Europeans' joining a "mini-regime" for seabed mining.

Before the conference, Reagan officials campaigned actively to draw the British, the Germans, and the French into a compact to organize seabed mining outside the Law of the Sea Treaty. By the end of February, the U.S. and its three principal European allies had virtually completed negotiations for a Reciprocating States Agreement. None wished to sign during the conference, though. And now that the treaty has been put in approved form and will almost surely be adopted, they cannot sign such an agreement without forfeiting their rights under the treaty. That U.S. alternative appears closed.

If key administration policy-makers had wanted an improved treaty, and had mounted their campaign with the finesse of Henry Kissinger, what could they have achieved? According to a variety of Third World, Western, and UN sources, a more flexible U.S. position might have permitted treaty provisions more favorable to American interests in the areas of decision-making, technology transfer, and accountability for the seabed regime. Knowledgeable observers speculate, however, that hard-liners in the administration didn't want the concessions that the Third World was willing to give, because each improvement would strengthen the treaty's attractions for the Europeans.

In sum, U.S. negotiators failed to achieve any of the President's objectives, and may have lost a lot more. While showing the world that the United States will not be pushed around, we have also lost direct access to the "strategic minerals" of the seabed and we may have consigned our sailing ships to a complicated limbo outside the internationally accepted legal framework.

The costs of rejecting the treaty lie somewhere down the road. Although they have effectively been cut out, most U.S. seabed-mining companies continue to endorse the administration's decision. In fact, they have lost nothing. If the potential for profits begins to escalate, they can always get back into seabed-mining through foreign subsidiaries.

What has been lost is one of the administration's main objectives—securing U.S. access to the ocean's minerals. Of the four principal mineral deposits, however, copper and nickel are available from many other sources; cobalt, though mainly supplied by a politically shaky Zaire, can be extracted elsewhere, at a higher price. Without the seabed resources, our greatest long-run concern is the supply of manganese, because the Soviet Union and South Africa hold the major reserves.

The United States can expect to buy manganese and the other three minerals from any of the seabed miners (including companies based in Western Europe and in Japan) when increased demand makes mining them profitable. Friends and neighbors such as the Canadians and the Australians, sitting on large reserves of nickel, question whether the U.S. should be so anxious about access to seabed minerals.

What, then, are the truly vital U.S. stakes in the treaty, and how will our decision not to sign affect them? Assured navigation rights are and always have been the primary U.S. interest. Regarding the minerals themselves, and the precedents embodies in the Seabed Authority, the United States did wage a continuing struggle from the outset of the negotiations to guard its own and Western interests—and thus improve prospects for Senate ratification. The Carter delegation, under Ambassador Elliot Richardson, even inserted a virtual mining code into the seabed text to secure fair terms of access for mining enterprises.

The administration's main objections to the treaty were to provisions concerning production limitations, technology transfer, and majority-rule decision-making (especially in the amending process).

On many of these issues Richardson won technical concessions that protect real U.S. interests. On technology, for example, the treaty stipulates that contractors shall make technology available to the authority "on fair and reasonable commercial terms" for the first ten years of the Enterprise—but only if the same or equally useful equipment cannot be obtained on the open market. Since, according to studies conducted for the U.S. Interior Department, the seabed technology is now or will be available on the open market, this provision will have little impact on U.S. technology sources.

As for production limitations, proponents' fears of cartels and escalating prices should be assuaged by the fact that the limits, set on the basis of complex formulas developed largely by American economists, float way above plausible projections of future seabed production.

Given the disproportion between political power and population size, decision-making disputes will continue to vex seabed politics. While the treaty defines the Seabed Authority's one-nation/one-vote assembly as "the supreme organ," the authority's thirty-six-member council (on which the United States holds a guaranteed seat if it signs the treaty) is given explicit responsibility for business on a day-to-day

basis, and virtually all important issues, the treaty stipulates, must be decided unanimously by the council.

However, the process for amending seabed provisions—a review conference may re-examine the treaty fifteen years after the start of seabed mining, and amendments may be approved by a three-fourths-majority vote five years later if no consensus can be reached—rightly irritates U.S. policy-makers Apart from the question of whether the United States would be bound by an amendment before the Senate had ratified it, the review conference could also restructure the relationship between private enterprise and the international authority, changing the ground rules upon which the present bargain has been struck. Thus the United States could be forced, some years down the road, either to accept a revised treaty or to drop out altogether.

However, in the opinion of Bernard Oxman, an international lawyer and former vice chairman of the U.S. delegation, radical changes would call into question the workability of the whole seabed compact, and therefore they are unlikely to happen. In the future, as now, U.S. leverage will depend on how cohesively this country works with its allies. If a Third World cabal tries to impose an international monopoly several decades hence, the United States and the other seabed miners can resist if they work together.

In aggregate, the seabed-mining provisions do raise the costs for private enterprise. However, the treaty's terms for mining are no more severe than those currently imposed by many Third World countries, where U.S. companies agree to transfer technology, build infastructure, and pay whatever licensing fees are required.

If the U.S. stays out of the treaty, on the other hand, all these calculations become moot: U.S. corporations will lose their options to mine the seabed, because they will lack the secure legal claim they need to raise capital. The same legal uncertainties seem likely to discourage America's European allies from contemplating a mini-treaty.

Beyond the seabed, the costs of U.S. opposition are less easy to define, and more serious. Many experts dispute the administration's contention that we can reject the seabed regime but navigate freely through the straits under "customary law."

Reportedly, all the European delegates to a July NATO meeting on the Law of the Sea expressed real doubts that the U.S.—as a non-signatory—could rely on customary law. On this point, Alan Beesley, head of the Canadian delegation, warned in a speech before the UN in April that the new definitions of navigation rights must now be regarded as subject to the law of treaties rather than to customary law. Moreover, Spain, which overlooks the Strait of Gibraltar, emphasized when voting for the convention that it did not view the treaty as merely confirming customary law.

Since coastal states are enthusiastic about the twelve-mile territorial sea and the 200-mile economic zone, the treaty's extensions of jurisdiction may qualify as customary law; transit rights through straits however, were negotiated into the treaty through hard-fought tradeoffs. Thus they cannot be considered as separate from the package deal. Nor can agreements governing marine scientific research, management of fisheries and protection of the marine environment, or limitations on a coastal state's interference with shipping to protect its environment.

In fact, U.S. non-participation in the treaty will undoubtedly work against the evolution of the treaty into customary law. In the first place, the United States, throughout its history, has been noted for extensions of its jurisdiction over resources and navigation in its coastal waters. For example, during Prohibition, the U.S. declared its right to search all vessels for rum smugglers in a fifty-mile zone; we enforced a 200-mile sanitary zone in the years immediately prior to our entry into World War II; and President Truman proclaimed U.S. rights to mine the continental shelf in 1945, years before any other coastal state moved even tentatively in that direction. Thus, the U.S. Congress, not bound by the treaty, may well fall into the historical pattern and itself and to restrictions on navigation in the 200-mile zone.

Second, other nations may challenge U.S. navigation rights in their coastal waters and straits. Department of Defense spokesmen assert that U.S. power and influence will make such challenges unlikely, inducing "rational behavior" in other coastal states, who know our bottom line: we can always "shoot our way through."

Problems for U.S. navigation are, however, likely to take more subtle forms. States that control straits, such as Spain and Indonesia, could use U.S. non-participation in the Law of the Sea Treaty as a pretext for exacting a higher price during negotiations for, say, base rights, reciprocal taxation, or consular agreements. Eventually, U.S. commercial ships might be forced to pay large tolls to navigate other

states' coastal waters. Thus, the United States eventually might have to buy treaty rights in a series of bilateral deals.

Somewhat different dilemmas could bedevil U.S. military planners during a crisis. Although coastal states are unlikely to stop U.S. military vessels, the possibility injects an ambiguity into planning that might inhibit military actions. In a Middle East conflict, for example, U.S. reluctance to violate rights asserted by states in the area would greatly complicate resupply of Israel. Again, the price tag for secure U.S. expectations could escalate. (We could end up paying Spain alone more than the value of the deep-sea nodules.) The search for a way to avoid this sort of ad hoc bartering about jurisdiction is what impelled us to seek a treaty in the first place.

Similar motives will likely lead our allies to endorse the treaty now. The treaty-making process itself puts pressure on them to sign the convention soon. A plenary session was held in New York this September, and the signing ceremony will draw the delegates together again in December. Only those who sign the convention have the right to vote in the next phase of negotiations, the seabed Preparatory Commission, which will draw up the rules and regulations for the seabed regime. The commission may, for example, decide whether or not the PLO will share in seabed benefits; it will lay down detailed guidelines on access to seabed mining; and it will set the budget for the regime. Thus possible participants in the regime—and particularly potential miners—ought to keep a hand in until the last "t" is crossed.

The Japanese have already voted in favor of the treaty, and their interest in straits navigation, secure access to seabed minerals, and amicable relations with their Third World neighbors makes them unlikely to change their minds. The French, who also voted in favor, seem likely to sign early: the Mitterrand government has made North-South relations a priority, and treaty provisions give France—with its island possessions—the third largest economic zone in the world.

The United States has reportedly put a lot of pressure on the Thatcher government not to sign. However, Great Britain can best safeguard its main interests—navigation and the oil of its vast continental shelf—from within the treaty. Moreover, according to a British source, British industry (particularly the oil companies) solidly backs the treaty, and the British public, reflecting a national disposition favoring international law, supports treaties just as a matter of course.

In Germany, on the other hand, ideological opposition to the seabed regime most closely approximating that in the United States has shown itself—chiefly in parliamentary speeches by the CDU-CSU opposition. Almost entirely deprived of coastal resources, the Germans place comparatively more importance on seabed mining than do their French and British partners in the European Community. On the other hand, Germans come under a particular pressure to sign. The conference selected Germany as the site for the treaty's dispute-settlement tribunal—the first time since World War II that Germany has attained this form of international acceptance.

Although the allies do not wish to confront the United States over the treaty, in a sense this country has already confronted them. Reportedly, the precipitate U.S. declaration in July that we would not sign the convention, largely taken without allied consultation, incensed the Europeans. In addition, the overt U.S.-European conflict about the Soviet natural-gas pipeline seems to have broken down some of the conventions of inter-alliance civility and cooperation that might ordinarily foster U.S.-European solidarity.

In all likelihood, the Europeans will make up their minds more or less in concert with each other, and will, for the most part, sign the convention in time to vote in the Preparatory Commission at an early stage. Ratification need not follow for several years (while the commission completes its work), but in none of these countries would the treaty face anything like the U.S. senatorial hurdles, and basic interests and attitudes will probably remain pretty much the same during that period.

For the next several years, America's new international isolation may seem hardly to affect us. As Secretary Lehman sees it, "We will remain what we have always been—the primary guarantor of freedom in the world." Others see us differently, however. Ambassador Djalal characterized the U.S. position as one of "total isolation in the world community of nations."

Perhaps the most serious consequence may stem from the U.S. rejection of commonly accepted international law—or rather our attempt to rely on the parts of it we like while discarding the rest. As a nation we have, for good reason, preached the gospel of international law. Our far-flung political and economic interests can best thrive in an orderly world, and our democratic impediments to distant military adventures dictate a commitment to the peaceful settlement of disputes. In time, U.S. maneuverings outside treaty law will serve to weaken American credibility in

denouncing terrorist violence, the illegal seizure of American embassies, and the unlawful use of force by the Soviet Union or by its proxies.

As time goes on, challenges to the United States will further erode the U.S. position as Western leader. In whatever way it meets them, the United States will lose face every time that it reaffirms its position as international maverick.

If its opposition to the treaty places the United States in an untenable position, what can be done about it? According to Ratiner and others, a few discreet amendments that would help ease the treaty through Senate ratification could be obtained between now and December. Since the President has firmly rejected the idea of such changes, however, another, more favorably disposed administration will have to take the treaty as is. In the future, neither Senate ratification nor treaty amendment will be easy to obtain. Although the costs of non-participation plainly will not permit the United States to remain outside the treaty indefinitely, the new American unilateralists may have ensured that outcome for some time to come.

JENNIFER SEYMOUR WHITAKER.

Report of the Committee on The Law of The Sea

(June 1982)

AMERICAN BRANCH
OF THE
INTERNATIONAL LAW ASSOCIATION

REPORT OF THE COMMITTEE ON LAW OF THE SEA

(July 1982)

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CHAIRMAN'S PREFACE

This report covers developments in the Law of the Sea since the last report of this Committee in the summer of 1980. It seeks to summarize dispassionately the proceedings and outcome of the Eleventh Session of the Third United Nations Law of the Sea Conference, which voted to adopt a comprehensive new Convention on Law of the Sea, with the United States voting against and the Soviet Union abstaining. The report then raises for future discussion and analysis a few of the many questions posed by the outcome of the Eleventh Session. The report suggests that, although the completion of the work of the Conference is imminent, its failure to achieve consensus poses significant challenges to students, professors and practitioners of international law.

The rapporteur for this report is Jan Schneider of the New York and District of Columbia Bars. Jan, who holds a J.D. and Ph.D. from Yale University, has had a long interest and involvement in the LOS negotiations. She has followed these negotiations as an

the LOS negotiations. She has followed these negotiations as an observer for the U.N. Environment Programme. Jan's book, *World Public Order of the Environment*, has received the American Society of International Law Certificate of Merit and an International Studies Association award. The Committee is indebted to Ms. Schneider for her unstinting labors.

A draft of this report was circulated for comment to all members of the Committee. Jan Schneider and I have attempted to incorporate most of the comments received, while trying to achieve objectivity and balance so as to command the broadest possible support of the Committee's diverse membership. We hope that this report will enjoy wide support as a fair and succinct summary of past proceedings and as an agenda for future deliberation.

JOHN T. SMITH II

This Report is issued as the Third United Nations Conference on the Law of the Sea has just completed its Eleventh Session and adopted a new Convention on the Law of the Sea and four Resolutions of the Conference. The Convention and accompanying resolutions were adopted by a vote of 130 to 4 with 17 abstentions. The United States voted against adoption.[1]

Previous Reports issued by this Committee in March 1978 and in June 1980 dealt with the status of the negotiations respectively through the Sixth and Eighth Sessions of the Conference. The present effort will not retread old ground, nor undertake a comprehensive assessment of the entire treaty. Rather it concentrates on important developments in the negotiations since our last Report, particularly developments that have resulted from the approach of the U.S. Government at the two most recent sessions of the Conference.

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[1]Venezuela, Israel and Turkey also voted against adoption. The Federal Republic of Germany, the United Kingdom, Belgium, Italy, Luxembourg, the Netherlands, Spain and Thailand abstained. The Soviet Union and the other members of the Eastern European Group (except Romania and Mongolia) also abstained.

I. DEVELOPMENTS THROUGH ADOPTION OF THE CONVENTION

In its final form, the Convention, like previous drafts, is composed of seventeen main parts, consisting of 320 articles, dealing comprehensively with such maritime questions as: commercial and military navigation, including transit passage through straits; 12 nautical mile territorial seas; rights of coastal States to living and nonliving resources in newly created 200 nautical mile "exclusive economic zones"; a revised regime for coastal state jurisdiction over the continental shelf; rights of access of land-locked States to and from the sea and freedom of transit; a regime for archipelagic waters; creation of a new international body, the International Seabed Authority, with its operating arm, the Enterprise, to govern and carry out, as part of a "parallel system" involving other entities, exploration and exploitation of the mineral resources of the ocean floor beyond the limits of national jurisdiction (the "Area"); protection and preservation of the marine environment; marine scientific research; development and transfer of marine technology; and a system for compulsory third-party settlement of disputes. The main body of the treaty is followed by eight detailed annexes, enjoying equal legal status with the main body of the treaty articles.

A. *Background Developments*

The broad outlines and most of the details of this comprehensive convention had emerged by the end of the Resumed Ninth Session of UNCLOS III in the summer of 1980. At that time many thought that the overall compromise on the whole package, including the provisions for exploration and exploitation of the mineral resources of the deep seabed, had been worked out, and that substantive work remained to be done primarily in the areas of the "three P's": (i) Preparatory Investment Protection for pioneering seabed miners making investments before entry into force of the Convention; (ii) the Preparatory Commission to prepare detailed rules for the mining of the seabed pending establishment of the Seabed Authority, and perhaps for later use by the Authority; and (iii) Participation in the Convention, *i.e.* the issue of the roles of regional or international organizations such as the European Economic Community as well as the politically volatile issue of the role of national liberation movements and territories not enjoying full independence or other self-governing status. The results of the negotiations at the Resumed Ninth Session were incorporated in the Draft Convention on

the Law of the Sea (Informal Text), A/Conf.62/W.P.10/Rev.3 (Aug. 27, 1980), known as "Rev.3," which replaced the previous Informal Composite Negotiating Text or "ICNT Rev.2" discussed in this Committee's last report.

As most delegates assembled in New York in the spring of 1981 for what they thought would be the final stages of the negotiations, the new Reagan Administration announced its intention to undertake a "comprehensive policy review" of the Draft Convention on the Law of the Sea. As a result, most of the Tenth Session was dominated by reactions to the U.S. action; apart from the Drafting Committee continuing its perusal of the text in six languages, little was accomplished.

The same was true of the Resumed Tenth Session, which met in Geneva in the summer of 1981, since the United States had not yet completed its Review. At that session, however, the U.S. representative, Ambassador James L. Malone, set forth at some length the basic concerns of his government with the text of the Draft Convention, and the Group of 77 (G77) replied, making clear their opposition to changing the text in any fundamental respects, but indicating a willingness to discuss U.S. concerns.

At the Resumed Tenth Session, the Conference did choose the sites for the new International Seabed Authority in Jamaica and for the International Tribunal for the Law of the Sea in the Federal Republic of Germany (at Hamburg). A new formula was also achieved for articles 73(1) and 84(1) on delimitation of the continental shelf and the exclusive economic zone between opposite and adjacent states. In addition, the Conference decided to raise the status of its text, by deleting the designation "Informal Text" and giving it a formal symbol, so that the document before delegates became the Draft Convention on the Law of the Sea, A/Conf.62/L.78 (28 August 1981). Finally, at the Resumed Tenth Session, the decision was taken that the Conference would hold its final decision-making session in New York for eight weeks in March and April 1982, and that plans should be made for the signature of the Final Act of the Conference and the opening of the Convention for signature in Caracas in early September 1982.

B. *U.S. Government Review*

Meanwhile, the U.S. Government continued its Review. A Statement by the President announcing the results of the Review was issued on January 29, 1982.[2] After indicating that the Draft Convention satisfactorily accommodated U.S. interests in navigation, overflight, fisheries, environment, deep seabed mining, and other areas covered, the Administration concluded that "some major elements of the deep seabed mining regime are not acceptable". Consequently, the United States announced that it would seek changes in several important aspects of the deep seabed mining provisions, to achieve the goal of a treaty that accomplishes the following six objectives:

"—will not deter development of any deep seabed mineral resources to meet national and world demand;

—will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international Authority, and to promote the economic development of the resources;

—will provide a decision making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;

—will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

—will not set other undesirable precedents for international organizations; and

—will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements."

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[2] 18 *Weekly Comp. Pres. Documents* 94 (1982).

The January 29 Statement, to repeat, did not identify any major U.S. concerns with the Draft Convention in areas other than Part XI relating to the Authority and its deep seabed mining provisions. Nor did the Reagan Administration in any subsequent negotiations indicate fundamental dissatisfactions with the many other major provisions of the Draft Convention.

C. *Eleventh Session*

When the Conference next resumed at its Eleventh Session, which met in New York from March 8 to April 30, 1982, the major question was whether and to what extent the Conference would accommodate U.S. insistence that the seabed mining portions of the Convention be substantially amended. Some members of the Group of 77 took the position that the Group had already compromised as much as it could, and that they would not agree to what they considered to be further unilateral concessions. The prevailing view was, however, that there should be an open exchange with due consideration given to all points of view.

1. *The "Approaches" Paper.* Expanding upon the President's Statement of January 29, the United States, in an effort to demonstrate flexibility in negotiating changes to meet its concerns, elaborated its positions in a paper entitled "Approaches to Major Problems in Part XI [on "The Area"] of the Draft Convention on the Law of the Sea," dated February 24, 1982. This document was distributed to other delegations by the United States during the opening days of the Eleventh Session.

The "Approaches" paper deals with several clusters of major U.S. problems with Part XI on the international seabed Area, namely: (a) decision-making, including composition of the Council of the International Seabed Authority, decision-making in the Council and powers of the Assembly of the Authority; (b) the Review Conference, including the question of entry into force of Review Conference amendments without United States consent and the risk that the system of exploitation will be radically changed by such amendments; (c) the system of access to deep seabed minerals, involving problems concerning approval of contracts, possible "regulatory interference" by the Authority, a potential for discrimination against seabed mining companies sponsored by industrialized countries, and the fact that Part XI was prepared with

specific reference to manganese nodules and fails to provide for exploration and development of other deep seabed mineral deposits; (d) the mandatory aspects of private technology transfers, including limiting the length of time for requiring technology transfers, third-party transfers and transfers to developing States; (e) production limitations and policies, including the production ceiling, commodity agreements and production policies of the Authority; (f) the Enterprise, including the terms and conditions of its financing. the lack of protection for State Party contributions, and for major financial contributors to the Enterprise as creditors, alleged discrimination in favor of the Enterprise over other seabed miners and a potential Enterprise monopoly over the most attractive sites for second-generation mining under the reserved area system; (g) participation of national liberation groups, including the right of the Palestinian Liberation Organization and other such groups to receive revenues distributed by and to enjoy other benefits from the Authority; and (h) the need grandfathering of rights, which concerns the protection of investments made by seabed mining companies prior to entry into force of the Convention.

Under each of these broad headings and subheadings, a range of possible solutions was set forth. On the first problem, for example, several solutions were indentified regarding composition of the Council, including: (i) "explicitly naming the U.S. as a permanent member of the Council"; (ii) "reserving seats in the seabed miner chamber of the Council for the countries whose nationals account for the largest share of seabed investments and, in the consumer chamber, for the largest consumers of the minerals to be produced from the deep seabed"; and (iii) "reserving a certain number of Council seats for the highly industrialized countries and largest financial contributors to the Authority and the Enterprise". To meet the additional U.S. criticism that the voting system of the Council does not adequately protect the economic and financial interests of the United States and other major countries, it was proposed that the Council vote in a weighted fashion, or by chambers or by a combination of these methods in making decisions on selected issues. Under each of the other major problems and aspects of these problems, a similar list of at least two or three alternative approaches to resolution was provided.

2. *The "Green Book"*. With the "Approaches" paper in hand, many members of the Group of 77 still did not feel that they yet had a clear and precise enough statement of the changes that the United States was seeking in the Part XI provisions. They therefore in-

sisted that the United States come forward with a detailed "book of amendments." This the United States proceeded to do, and at the end of the first week of the Eleventh Session such a document was circulated to delegations; it was entitled "The U.S. Proposals for Amendment to the Draft Convention on the Law of the Sea," and from the color of its covers was known as the "Green Book." The Green Book was not presented as an ultimatum, but rather was said by the U.S. delegation to be exemplary of the kinds of changes required to satisfy Presidential objectives.

In the Green Book, the United States proposed specific amendments, either new language or deletions, to 26 of the 59 articles in Part XI. In addition to these changes to Part XI itself, in the Green Book, the United States proposed numerous changes to provisions in the Annexes to the Draft Convention relating to Part XI. In Annex III on "Basic Conditions of Prospecting, Exploration and Exploitation," amendments were proposed to 13 of the 22 articles. In Annex IV comprising the "Statute of the Enterprise," there were also proposed amendments to 9 of the 13 articles.

The amendments proposed by the United States were not only extensive but detailed. The Green Book did not contain a range of alternative solutions, as in the "Approaches" paper, but rather set forth the maximum U.S. position on each provision. The Green Book reproduced the text of each article as it appears in the Draft Convention, set out proposed U.S. amendments, and showed the text of each article as it would read with the proposed amendments.

3. *Group of 11 Proposals.* In an attempt to effect a compromise between the positions of the United States and of the Group of 77, a small group of developed countries of intermediate size—which became known as the "Group of 11"—got together and drafted their own set of proposed amendments. The Group of 11 proposals, which became known by their document symbol of "L.104",[3] were sponsored by Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden and Switzerland.

The proposed amendments in document L.104 were addressed to a number of articles in Part XI of the Draft Convention on the Area and in its related Annex III on Basic Conditions of Prospecting, Exploration and Exploitation. In Part XI, the Group of 11 proposed amending the following articles: 150 to place greater emphasis on

[3] A/Conf.62/L.104 (13 April 1982) and Add.1 (14 April 1982).

development of the resources of the Area; 155 to provide that decision-making at the Review Conference shall be by the same procedure as that applicable at UNCLOS III, with every effort being made to reach agreement by "consensus" before voting, and that States Parties not ratifying or acceding to Review Conference amendments shall continue to enjoy the rights and perform the obligations of other provisions of the Convention; 158 and 160 to preserve the separate powers of each organ of the Authority; 161 to guarantee a seat on the Council to "the largest consumer" of seabed minerals and to require a majority of ¾ + 1, instead of ¾, for substantive decisions by the Council relating to submissions of the budget of the Authority to the Assembly.

In Annex III, the most major change proposed by the Group of 11 was to Article 5 on Transfer of Technology. Instead of requiring companies as a condition of contracts actually to make technology available to the Enterprise on fair and reasonable commercial terms and conditions, the L.104 version of this article would require contractors only "to co-operate with the Authority in the acquisition by the Enterprise on fair and reasonable commercial terms and conditions of the technology necessary for the carrying out of its activities in the Area"; to make available to the Enterprise technology which they have made available or are willing to make available to third parties on no less favorable terms and conditions; and to take certain other relatively minor steps toward these ends. There were also proposed some changes in the dispute settlement provisions of Article 5 and a new provision in which States would undertake certain responsibilities to facilitate technology transfer. In addition, the Group of 11 proposed certain amendments to other articles in Annex III, namely: 1 on "Title to minerals"; 3 on "Exploration and Exploitation"; 4 on "Qualifications of applicants"; to add a new 4 *bis* on "Certification of applicants"; 6 on "Approval of plans of work"; and 17 on "Rules, regulations and procedures" of the Authority.

4. *Proposed Amendments by the United States et al.* The United States declared itself unsatisfied with the provisions of the Group of 11 amendments (and continued to maintain this position until the last day of the Conference, just before the vote on the "package deal", when Ambassador Malone suggested that L.104 should be "carefully considered"). Having refused to accept these amendments as the basis for further negotiations unless the Group of 77 agreed also to discuss those issues contained in the President's objectives but not in the Group of 11 proposals, the United States con-

tinued to press its own amendments, joined by several other States with strong interests in seabed mining. Along with the U.S., the delegations of Belgium, France, the Federal Republic of Germany, Italy, Japan and the United Kingdom put forth one set of amendments, and five of these countries (i.e., less France and Japan) sponsored a second set.

The first set of amendments by the seven States was addressed to Part XI and Annexes III and IV of the Draft Convention.[4] These proposed amendments, while not in all instances identical to the wording sought by the United States in the Green Book, essentially addressed the same concerns with a view toward achieving the same results (although they did contain some modifications, most notably in reducing the scope of the changes sought by the U.S. in the area of production policies). In a few instances, for example on the decision-making procedure for the Review Conference or the organs of the Authority, these amendments did adopt alternatives suggested in L.104, but by and large, they sought considerably more dramatic changes.

The second set of amendments was addressed to Draft Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules (i.e., the second of the three "P's": Preparatory Investment Protection or "PIP").[5] These PIP proposals would guarantee "pioneer investors" (defined as those who have spent at least $30 million by January 1, 1983, 10% on site-specific activities) protection, after the entry into force of the new Convention, for investments made before that date. Among other things, they envisioned not just exploration activities, but specifically provided that nothing in the Resolution shall be construed to prohibit commercial production after January 1, 1988 if the Convention has not entered into force by that date.

5. *President's Texts.* In an attempt to improve the prospects of a consensus, the President of the Conference, Ambassador T.T.B. Koh (Singapore), proposed two sets of amendments of his own, as a result of consultations held by him and the Chairman of the First Committee, Ambassador Paul Bamela Engo (Cameroons), with a large number of delegations. The first was presented in the Report of the President to the Conference in Accordance with Rule 37 of the Rules of Procedure of April 22, 1982, and the second was distributed

[4] A/Conf.62/L.121 (13 April 1982).
[5] A/Conf.62/L.122 (13 April 1982).

on the next to last day of the Conference in the Report of the President to the Conference of April 29, 1982.[6]

The first set of amendments, proposed by the President on April 22,[7] met or met in part only three, of the United States concerns on Part XI. It provided that in Article 150 there should be an emphasis on develoment of the resources of the Area, that in Article 155 the decision-making procedure of the Review Conference should be that of UNCLOS III embodying the "consensus" concept, and that in Article 161 a seat on the Council should be guaranteed to "the largest consumer".

As regards Draft Resolution II on PIP, the President's first set of amendments provided the United States with much of what had been sought, at least as far as first-generation seabed miners are concerned. President Koh did, however, expand and specifically name the list of "pioneer investors." They are defined in three groups: (i) France, Japan, India and the Union of Soviet Socialist Republics, or a State enterprise or one natural or juridical person or national of each of those States, provided that the States concerned sign the Convention and the investors meet the $30 million and 10% criteria by January 1, 1983; (ii) the four existing seabed mining consortia, whose components are natural or juridical persons possessing the nationality of or effectively controlled by one or more of the following States: Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, the United Kingdom and the United States, provided that a certifying State or certifying States sign the Convention and the entity meets the above specified qualifying criteria by January 1, 1983, and (iii) any developing State signatory or entity or natural or juridical person of such developing State which meets the qualification criteria by January 1, 1985.

The first set of Koh proposals also made some changes in the provisions of the Convention and of Draft Resolution IV on the troublesome problem of national liberation movements. Basically, they would allow liberation movements such as the PLO that participated in UNCLOS III as observers to sign the Final Act as observers and to participate in the Authority as observers.

The second set of Koh proposals, presented on the penultimate day of the Eleventh Session,[8] was more problematical. In particular,

[6] A/Conf.62/L.132 & Add.1 (22 April 1982), and Corr.1 & Add.1/Corr.1 (23 April 1982); A/Conf.62/L.141 (29 April 1982), Add.1 (28 April 1982), Add. 1/Corr.1 (30 April 1982).

[7] A/Conf.62/L.132/Add.1 and Add.1/Corr.1, *supra*.

[8] A/Conf.62/L.141, Add.1, *supra*.

it contained a proposed amendment to the transfer of technology provisions of Article 5 of Annex III, which instead of moving in the direction of the proposals by the United States *et al.* or of the Group of 11, appeared to the United States delegation and others to be a step backwards from even the existing provisions of the Draft Convention. This proposed modification was later withdrawn by the President on the last day of the Conference.[9]

The second set of Koh proposals contained some other less controversial changes. One was to change the majority required for the entry into force of amendments adopted by the Review Conference from 2/3 to 3/4 of the States Parties (which was said not to meet the basic U.S. objection that amendments should not become effective without its consent). Others related to an Austrailian proposal on "unfair economic practices", to granting of priority to the adoption of rules, regulations and procedures for the exploration and exploitation of polymetallic nodules as distinct from other deep seabed mineral resources, to the order for dealing with proposed plans of work submitted by applicants to the Authority, to preferential treatment of pioneer investors in the allocation of production authorizations and to the entitlement of the Enterprise to two minesites on a priority basis.

6. *Other Amendments.* Apart from those mentioned above, there were a number of other formal amendments submitted during the Eleventh Session. In all, apart from the President's proposals just discussed, there were 30 amendments or sets of amendments submitted, not only to Part XI but to other parts as well.[10] Most noteworthy and probably most troublesome among them was a proposal by some 28 developing countries concerning coastal State laws and regulations which could limit innocent passage in order to protect "security" interests in the territorial sea.

When the dust had cleared, however, the great majority of these proposed amendments was not pressed to a vote. Only Spain, Turkey and the Council of Namibia put their amendments to a vote. One amendment by Spain concerning State aircraft in transit over straits used for international navigation was rejected by a vote of 21 in favor to 55 against with 60 abstentions; a second Spanish amendment, according to which States bordering straits would be enabled

[9] *See* A/Conf.62/L.141/Add.1/Corr.1, *supra.*

[10] These are found in documents A/Conf.62/L.96 (13 April 1982) through A/Conf.62/L.126 (13 April 1982). There was also one amendment to Article 60 paragraph 3 on artificial islands, installations and structures in the exclusive economic zone which met the required consensus requirements. *See* Report to the Plenary by Ambassador Andres Aguilar (Venezuela), Chairman of the Second Committee, A/Conf.62/L. 87, p.2 (27 March 1982).

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to give effect to "generally accepted" (rather than "applicable") international regulations regarding pollution discharges, was rejected by 60:29:51 (being rejected although it met the procedural 2/3 requirement, since it did not meet that of an absolute majority). A Turkish amendment which would have deleted the article prohibiting reservations to the Convention by States Parties was also rejected 18:100:26. A fourth amendment by the Council of Namibia containing a compromise formulation allowing Namibia to sign the Convention in a special category by itself was adopted by consensus.

D. *Adoption of the "Package Deal"*

After disposition of the formal amendments, delegates at the Eleventh Session took the final step of adopting the overall "package deal". The package, which was put to a vote as an integral whole (over the objection of the U.S.S.R. and some other delegations) consisted of the Convention on the Law of the Sea and four accompanying resolutions. The Convention, as put to the vote, was the Draft Convention on the Law of the Sea as modified by the changes in the two Reports of President Koh, discussed above.[11] The four resolutions in the package were as follows: Resolution I Establishing the Preparatory Commission for the International Sea-bed Authority and the International Tribunal for the Law of the Sea;[12] Resolution II Governing Preparatory Investment in Pioneer Activities by States and Private Consortia Relating to Polymetallic Nodules;[13] Resolution III on the Rights and Interests of Territories Which Have Not Attained Independence or Self-Government;[14] and Resolution IV On the Right of Recognized National Liberation Movements to Sign the Conference's Final Act.[15] The Conference

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[11] A/Conf.62/L.132/Add.1 and Add.1/Corr.1, and A/Conf.62/L.141/Add.1 & Add.1/Corr.1, *supra*. The transfer of technology provisions from L.141/Add.1 were deleted. *See* L.141/Add.1/Corr.1, *supra*.

[12] A/Conf.62/L.94 (2 April 1982), as modified by A/Conf.62/L.132/Add.1, *supra*.

[13] A/Conf.62/L.132/Add.1 & Add.1/Corr.1, *supra*, as modified by A/Conf.62/L.141/Add.1, *supra*.

[14] A/Conf.62/L.94, *supra*.

[15] A/Conf.62/L.132/Add.1, *supra*.

also adopted by consensus a Resolution on Development of National Marine Science, Technology and Ocean Service Infrastructures proposed by the Group of 77.[16]

The vote on this package, to repeat, was 130 for:4 against:17 abstaining. The United States voted against.[17] In explaining the U.S. position, Ambassador James L. Malone stated in the Plenary that:

> "We came to this session determined to work together to reach improvements that would accord with United States objectives and ensure a viable seabed mining regime. I had hoped to be able to say today that we had successfully concluded our task and reached an acceptable outcome. Unfortunately, that is not the case and I cannot make such a report.
>
> Some modest improvements have been made in the draft treaty during this session. However, there has been an unyielding refusal on the part of some to engage in real negotiations on most of the major concerns reflected in the amendments proposed by the United States and co-sponsored by Belgium, the Federal Republic of Germany, France, Italy, Japan and the United Kingdom. We appreciate that others put forward compromise proposals to try to bridge the gap, but these efforts did not succeed."[18]

Of the co-sponsors of the U.S. amendments, the Federal Republic of Germany, the United Kingdom, Belgium and Italy abstained, while France and Japan broke ranks and voted with the majority.

The Soviet Union, Bulgaria, the Byelorussian S.S.R., Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland and the Ukrainian S.S.R. also abstained.[19] The issue in the case of the Eastern Europeans was alleged discrimination of the PIP provisions. The U.S.S.R. had addressed a letter to the President of the Conference complaining that private companies

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[16] A/Conf.62/L.127 (13 April 1982).

[17] Venezuela, Israel and Turkey also voted against. The reasons in the case of Venezuela and Turkey were the inability to make reservations concerning delimitation, and Israel objected to provisions regarding national liberation movements.

[18] These remarks by Ambassador Malone were distributed as a press release by the U.S. Delegation.

[19] Luxembourg, the Netherlands, Spain and Thailand also abstained.

should not be put on equal footings in potential disputes with sovereign States and that, while a State mentioned in the first group in the PIP resolution has to sign (but not ratify) the Convention to enjoy pioneer investor status, only one State sponsoring the companies of the consortia in the second group had to do so.[20] After receiving a response from U.N. Legal Counsel that the formulation in the PIP Draft Resolution is legally permissible and consistent with the practice of the United Nations,[21] the U.S.S.R. declared itself still dissatisfied. Deputy Minister Kozyrev wrote another letter to the President of the Conference on the second to last day declaring that the U.S.S.R.:

> "will be unable to support that draft resolution as it now stands and, accordingly, will be unable to become a party to the Convention if the resolution governing preparatory investment in pioneer activities still contains provisions which place the USSR in an unfavourable position vis-a-vis several other States."[22]

E. *Post-Session Developments*

Since the result of the vote on the "package deal" was not a happy one, as the Eleventh Session closed some delegates were still suggesting ways in which the consensus might be improved before the signing of the Final Act, the date for which has not yet been finalized but which will probably take place in Caracas in December 1982. President Koh at first opposed efforts to seek further changes, but later said he was a servant of the Conference and would not stand in the way of additional substantive changes should the Conference so desire.

1. *Suggestions for Further Negotiations.* There had been some suggestions by a few delegates from small industrial States and others that the occasions of the Drafting Committee Session, which will meet from July 12 to August 13 or 20, 1982, and the Informal Plenary, which will be held from September 22 to 24, 1982 to act on the recommendations of the Drafting Committee, might be used to try to achieve an improved prospect of a consensus. U.S. Ambassador Malone noted that such an effort had been rumored at a

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[20] A/Conf.62/L.133 (23 April 1982).
[21] A/Conf.62/L.139 (28 April 1982) & Corr.1 (29 April 1982).
[22] A/Conf.62/L.144 (29 April 1982).

press conference he gave the day after the close of the Eleventh Session.[23] At a press conference also given the same day, when asked about the idea, President Koh replied that "[t]he negotiations are closed"[24]; but, as noted above, he later stated that he would not oppose efforts to improve the consensus.[25]

2. *Koh Remarks Regarding Reciprocating States Regime.* It is also worth reporting that, at the same press conference, President Koh remarked that, if the United States and others proceed to conclude the so-called "mini-treaty" and begin to mine the seabed thereunder outside the new Convention, then he will persuade the U.N. General Assembly to seek an Advisory Opinion from the International Court of Justice on the legality of such mining. Depending on the opinion of the ICJ, he added, then it might be seen "whether these Western countries which have been sermonizing to the Third World about the rule of law, will ask their consortia to stop such activities."

II. THE CONVENTION MEASURED BY THE U.S. OBJECTIVES

As the Convention and Resolutions have now been adopted, the question for the United States becomes to what extent it will participate in, and enjoy the rights and fulfill the responsibilities of, the new regime. Analysis of this question, of course, involves review of the package as a whole—all the provisions concerning freedom of navigation and overflight, conservation and management of living resources, exploitation of oil and gas resources, of the continental shelf environmental protection, dispute settlement and a number of other provisions, including those relating to the controversial deep seabed mining issues.

As was indicated in the President's January 29 Statement, however, apart from the deep seabed mining provisions, the United States finds the rest of the text acceptable as part of an overall compromise. Ambassador Malone recalled in his statement to the Plenary of the Conference on April 30, 1982 concerning the Statement by the President that:

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[23] Ambassador Malone's press conference took place on May 1, 1982.

[24] This press conference also took place on May 1, 1982.

[25] Such remarks have been made to a number of delegates and interested observers. President Koh also stated this position at a meeting sponsored by the Association of the Bar of the City of New York.

> "Within the context of an overall acceptable treaty, he also noted that those many provisions dealing with navigation, overflight, the continental shelf, marine research and environment, and other areas are basically constructive and in the interest of the international community. They are, of course, not perfect, but they do represent the product of hard negotiation and reasonable compromise."

Consequently, it seems well here to focus on the seabed mining provisions of the Convention, and to assess them as they now stand, measured against the objectives set forth in the January 29 Statement and the problems presented in the "Approaches" paper.

A. *Development of Deep Seabed Mineral Resources*

The first objective set forth in the January 29 Statement was that the treaty "not deter development of any deep seabed mineral resources." Insofar as this concern is directed to the underlying philosophy of the new regime, an attempt was made in the amendments adopted at the Eleventh Session to meet it by specifying as the very first goal in Article 150 on "Policies relating to activities in the Area" that such activities should be carried out with a view to ensuring "the development of the resources of the Area"[26]. Yet, this objective might also refer to certain more practical considerations.

Probably the major area in which the U.S. Delegation has long expressed concerns regarding a deterrent effect on the development of seabed mineral resources involves the "Production policies" set forth in Article 151, and in particular the production ceilings for commercial production set forth therein. Some observers have argued, however, that in view of the existing world market for and trends in nickel production (the measuring rod for the ceilings), these provisions are not in reality a practical deterrent. It would seem that the U.S. delegation may have been somewhat persuaded of this assessment, since the far-reaching changes sought in Article 151 in the Green Book were radically moderated in the subsequent amendments proposed by the United States *et al.*[27] Nonetheless, there are within the U.S. Government those who strongly object on philosophical grounds to internationally-agreed production limitations regardless of their practical effects.

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[26] *See* A/Conf. 62/L.132/Add. 1, *supra*, Annex V.

[27] *See* p. 92 *supra*.

While U.S. concern with production policies appears to have abated somewhat in light of world market conditions, this is not the only area in which reservations have been expressed regarding a possible deterrent effect of the Convention on development of seabed mineral resources. The basic necessity of dealing with an international organization, the Authority, in respect of activities in the international Area, possible competitive advantages of the Enterprise, the system for banking additional sites and high front-end costs to prospective miners are a few considerations which have been suggested as disincentives to prospective miners and investors. It has, on the other hand, been pointed out that, without an international regime, however unwieldy, prospective miners and investors would not be assured of recognition of the legitimacy of activities in an area of global commons, which could constitute a much greater deterrent to the large commitment of financial and other resources necessary to undertake exploration and exploitation of the deep seabed.

From the practical perspective, the PIP Resolution as incorporated in the "package deal" at the Eleventh Session may be seen as a major step forward in removing impediments to the initial development of polymetallic nodules from the deep seabed. While some concerns have been raised regarding the fact that the PIP Resolution protects preparatory investments only in exploration as distinct from exploitation activities, and protects only certain first-generation seabed miners, this resolution appears to be satisfactory to the United States and other Western countries, at least as far as it goes.

The United States and others have expressed some concern that exploitation of deep seabed mineral resources other than polymetallic nodules could be blocked indefinitely by the failure of the Authority to adopt a regime in their regard. To remedy this situation, an addition was made in the President's second text providing that rules, regulations and procedures for exploration and exploitation of such resources shall be adopted within three years from the date of a request to do so from any member of the Authority (although the text is silent on what happens if such rules are not adopted within the requisite time).

B. *Assured Access to Minerals*

The second major concern expressed in the January 29 Statement was that the treaty would not afford the U.S. assured access to

seabed minerals. This has been contended, however, to be a misconception. The argument has been made that under the Draft Convention as it stood before the Eleventh Session, the text expressly ensured companies sponsored by a member State the right to apply for a "plan of work", spelled out the qualifications of applicants in clear, objective terms, and directed the International Seabed Authority to approve a plan of work proposed by an applicant meeting the specified financial and technical standards.

At the Eleventh Session itself, the situation was also somewhat improved. One of the amendments in President Koh's second text provided that all plans of work shall be dealt with in the order they are received, and that if proposed plans of work conform to the Authority's rules, regulations and procedures the Authority "shall approve such plans of work".[28]

Also, of course, the PIP Resolution is helpful on the question of assuring continuing access to seabed mineral resources for pioneer investors both before and after the Convention enters into force. It assures such pioneer investors continuing rights in their chosen areas and priority in the allocation of production authorizations under Article 151 of the Convention.

C. *Decisionmaking in the Authority*

The third objective set forth in the January 29 Statement—*i.e.* that decisionmaking in the deep seabed regime fairly reflect and adequately protect interests and financial contributions of participating States—was advanced during the Eleventh Session. One of the major U.S. aims in this regard was to ensure that the United States was guaranteed a seat on the Council of the Authority. It had been argued that, as a practical matter, the U.S. enjoyed such assurance under the Draft Convention as it stood, but the U.S. Delegation at the Eleventh Session felt that this should be made more explicit and succeeded in obtaining a satisfactory guarantee. One of the amendments proposed by President Koh in his first text and accepted by the Conference was to specify in Article 161 that membership on the Council shall include "the largest consumer" of seabed minerals.[29]

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[28] A/Conf. 62/L.141/Add. 1, *supra*, at 2.

[29] A/Conf. 62/L.132/Add. 1, *supra*, Annex V.

U.S. concern with decisionmaking in the Authority, has, however, gone beyond simply seeking a seat on the Council. In the Green Book, the United States sought certain amendments to Annex III, Articles 3, 4 and 6, with regard to automatic approval of plans of work submitted by companies upon certification of their qualifications by a sponsoring State, and also, in Article 161(7) (c) (*ter.*), the power to compel the Council to adopt rules, regulations and procedures. At least the latter demand was, however, later dropped in the formal amendments put forward by the U.S. and several Western co-sponsors.

More broadly, there is the basic question of whether the adoption of "consensus" requirements for the most crucial issues in the Council under Article 161 adequately protects the United States. A very strong argument can and has been put forward that, in a world where the "numbers game" is vastly disproportionate to real power alignments, and where the notion of "sovereign equality" has become such a cherished tenet of international endeavor, consensus procedures and requirements afford the only viable and politically realizable means of protecting U.S. interests.

D. *Review Conference Amendments*

A fourth very serious concern raised in the January 29 Statement relates to the process for entry into force of amendments adopted by the Review Conference. Prior to the Eleventh Session, the Draft Convention provided in Article 155 that such amendments shall enter into force for all States Parties after ratification, accession or acceptance by two-thirds of the States Parties. At the Eleventh Session, the two-thirds requirement was increased to three-fourths. Assuming this change to have been sincerely intended to ameliorate U.S. concerns, the opinion continues to be expressed that the basic procedure for bringing amendments into force is incompatible with U.S. constitutional processes for incurring treaty obligations.[30] It has, on the other hand, been pointed out that the United States has in the past agreed to simplified procedures for adoption without the necessity for advice and consent by the Senate at least as regards

[30] It has been suggested that any question in this regard could be alleviated by having the Senate agree to and depositing a conditional instrument of denunciation along with ratification of the Convention. The denunciation would become effective upon entry into force of any amendment not ratified by the United States. Denunciation could, of course, alternatively be a deliberate step taken in the light of the failure of an amendment to obtain U.S. ratification. Either procedure would, however, others point out, leave in great doubt the future status of any U.S. seabed endeavors after denunciation.

technical amendments in conventions sponsored by the Intergovernmental Maritime Consultative Organization (now the International Maritime Organization), the International Civil Aviation Organization and perhaps elsewhere, as is again provided for in Article 313 of the UNCLOS Convention in respect of amendments not concerning activities in the Area. The amendments contemplated under such precedential arrangements are, however, argued by some to be of a much more limited scope than those that might be sought at the Review Conference (although others disagree). In any event, it is surprising that certain other countries with similar constitutional systems have not expressed legal or political concerns comparable to those of the United States.

On a related matter, the decisionmaking procedures of the Review Conference, a significant change was made during the Eleventh Session. Previously, Article 155 on the Review Conference had provided only that "[t]he Conference shall establish its own rules of procedure." As a result of an amendment in President Koh's first text, the Convention now specifies that the decisionmaking procedure at the Review Conference shall be the same as that at UNCLOS III; the Conference shall make every effort to reach agreement on any amendments by way of consensus, and there shall be no voting until all efforts at consensus have been exhausted.[31] This has the salutary effect of fostering the consensus approach to international lawmaking, with the advantages for the United States noted earlier. Moreover, while it obviously does not meet the U.S. constitutional problem concerning entry into force of amendments, it should as a practical matter at least reduce the likelihood of adoption of amendments contrary to U.S. wishes.

E. *Undesirable Precedents for International Organizations*

The fifth objective set forth in the January 29 Statement, *i.e.* that the treaty "will not set other undesirable precedents for international organizations," is somewhat difficult to assess. The concern addressed in this point may have two aspects: political qualms over a system which extends the use of one-nation-one vote decisionmaking; and economic concerns with the extensions of central controls as opposed to free market conditions.

As to the first, throughout the discussions on institutional arrangements within the Authority, the Group of 77 sought the

[31] A/Conf.62/L.132/Add.1, *supra*, Annex V.

establishment of a decisionmaking system based on the one-nation-one-vote concept, which the G77 regarded as inherent in the concept of the "common heritage of mankind" and as necessary to promote the redistribution of wealth from the deep seabed as part of the New International Economic Order. The Western industrialized countries (and to some extent the Soviet Bloc) naturally viewed with grave misgivings the possibility of the emergence of a regime where their fundamental interests in deep seabed mineral resources could be jeopardized by exertion of the pure numerical might of the Group of 77.

To resolve this conflict, as discussed in this Committee's past reports, the Conference worked out a careful balance of powers and functions between the Assembly of the Authority, which can be expected to be heavily dominated by developing countries, and the Council, the Authority's executive organ of limited membership. The text also contains, in Article 161, highly specific requirements for voting on various issues in the Council, pursuant to which decisions on questions of substance arising under the most crucial provisions of the deep seabed mining regime are required to be by consensus.

As regards the second concern, the fundamental characteristic of the new seabed regime is, of course, that it is a parallel system (originally proposed by the United States) which combines mining by a centralized agency, namely the Enterprise, side by side with other miners. Moreover, in addressing this point, it must be remembered that the parallel system was designed for the exploitation of resources of an area of global commons as to which unfettered access was recognized to be inappropriate.

Thus, the institutional and decisionmaking arrangements within the Authority represent a compromise, and like any compromise they contain some undesirable elements. What possible undesirable "precedents" these highly idiosyncratic arrangements could possibly set for other international organizations, and how, remains difficult to predict.

F. *Advice and Consent of the Senate*

The last objective expressed in the President's January 29 Statement, that of having a treaty which "will be likely to receive the advice and consent of the Senate," is certainly irrefutable in the

abstract. There is, however, need for some further review of the particular concerns highlighted in the statement under this general heading.

1. *Transfer of Technology.* The Statement says broadly that the treaty should not contain provisions for the mandatory transfer of private technology. It has been pointed out that this concern may be greatly exaggerated, since a company is not required by the Convention to transfer its technology without adequate compensation. Under Article 5 of Annex III, the technology transfer obligation is applicable only on "fair and reasonable commercial terms and conditions" and then "only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market". In this respect, however, it may be regrettable that the United States did not express stronger support for the Group of 11 proposals earlier, since they would have improved the transfer of technology provisions from the U.S. point of view.[32] It is, more generally, regrettable that the Conference as a whole could not find a solution to this problem acceptable to all.

As a subsidiary aspect of the transfer of technology issue, it has been intimated that U.S. companies might be required to sell sensitive national-security-related technology. On the contrary, it has been noted that the U.S. Government would presumably deny an export license in any such case. Moreover, Article 302 of the Convention specifically states that "nothing in this Convention shall be deemed to require a State Party, in fulfillment of its obligations under the relevant provisions of this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."

2. *Liberation Movements.* The final concern expressed in the President's Statement related to "participation by and funding for national liberation movements," in particular the Palestine Liberation Organization. As regards participation, an acceptable compromise appears to have been reached at the Eleventh Session, pursuant to which liberation organizations which participated in UNCLOS III as observers will be able to sign its Final Act as observers and to participate in the Authority as observers.[33]

As regards "funding" for liberation organizations, the reference here is presumably to the statements in Articles 140, 160(f) and

[32] A/Conf.62/L.104, *supra*, at 5.

[33] A/Conf.62/L.132/Add.1, *supra*, Annex I.

162(n) that activities in the Area are to be carried out, and financial and other benefits derived therefrom equitably shared, taking into particular consideration the interests needs of developing States and of "peoples who have not attained full independence or other self-governing status." The response, however, has been made that any such sharing provisions can be implemented only pursuant to rules, regulations and procedures to be recommended by the Council of the Authority to the Assembly, decisions for which consensus is required under Article 161(d); the United States would therefore be in a position to prevent the PLO from receiving such benefits, although some members of the U.S. delegation are still uncomfortable with this solution.

* * *

At the time this report is being put in print, the U.S. Government has just completed a review, resulting in a decision not to participate in the new Law of the Sea Convention because of dissatisfaction with its deep seabed mining provisions. In the future, the U.S. Government may wish to reassess its position on the seabed mining provisions in light of continuing experience with the new mining regime within the total context of the overall functioning of the "package deal". It remains to be seen, however, to what extent actions by the Reagan Administration at present, particularly in declining to seek further improvements in the Convention, may preclude such future flexibility on the part of the United States.

III. FUTURE CONSIDERATIONS

As a result of the unfortunate outcome of the vote on the "package deal" at the end of the Eleventh Session of UNCLOS III, the future will be fraught with uncertainties for quite some time. What is the possible customary law effect of a new regime adopted by a vote of 130 to 4 with 17 abstentions, with the United States voting against and most of the European Economic Community and the Soviet Bloc abstaining? And if, or when, the new Convention is brought into force upon ratification by 60 states, what effects may it have on the rights and obligations of non-Parties, and in particular of the United States should it not become a party? Moreover, the prospect that a significant number of maritime powers which were Parties to the 1958 Geneva Conventions on the Law of the Sea may not become Parties to the new Convention raises the issue of

what may be the continuing vitality of the old regime among non-Parties and between non-Parties and Parties to the new Convention. Similar questions may arise in respect of various regional and bilateral agreements.

At present, there seems to be a polarization developing: opponents of the Convention, in the United States at least, are maintaining that its navigational and other non-seabed provisions are or will become part of customary international law; its proponents, on the other hand, contend that the Convention is a "package deal", and that the United States will not be able to enjoy rights under some provisions without accepting the responsibilities found in others. Different conclusions may be reached on this debate by Parties and non-Parties to the new Convention, by banks asked to finance prospective seabed mining operations, by the legal profession, by academic observers, and ultimately by the International Court of Justice. To some extent, the outcome may be influenced by a number of contingencies still to be resolved, and it seems well to examine available alternatives on a step-by-step basis.

A. *Further Negotiations*

The most immediate problem is, as mentioned earlier, whether between now and the signing of the Final Act in Caracas at the end of this year anything can or should be done to achieve further support for the Convention. As a practical matter, this question seems to amount to whether or not the Group of 77 may be persuaded to accept the compromise formulations in the Group of 11 proposals[34] in the hope of bringing the Federal Republic of Germany, the United Kingdom and other Western industrialized countries on board. In order to incorporate anything new in the Convention, however, given the procedural obstacles to doing so, it would appear also to require solution of the Soviet problem with the PIP Resolution.[35]

Should there be any movement in the directions just indicated, the United States might find itself faced with the necessity of deciding whether or not L.104 goes far enough toward resolving its concerns so that the United States would support or would decline to oppose an emerging consensus were L.104 to become the basis for

[34] A/Conf.62/L.104, *supra*.

[35] The Conference would presumably have to act by consensus, or by a vote to reconsider its decision of April 30, 1982, or by making some change in the Rules of Procedure. Any such measure would seem, as a practical matter, to require agreement among or acquiescence by the Western industrialized States, the Group of 77 and the Soviet Bloc.

such a consensus. There can be little doubt that incorporation of these proposals would represent an improvement from the U.S. point of view, particularly in the area of technology transfer. As discussed earlier, Ambassador Malone suggested on the last day of the Eleventh Session that L.104 should be "carefully considered", and he repeated in his press conference the next day that these proposals were "worthy of consideration". The question becomes: how worthy, and to what is the United States willing to commit itself in order to obtain a compromise acceptable to it?

B. *Final Act*

Whether or not L.104 or any other proposals are incorporated into the Convention, the Final Act of the Conference will be signed in a few months, probably in December 1982. It has been suggested by some that the United States and other countries who acted against or abstained in the voting on the "package deal" will have to decide whether or not to sign the Final Act. The prevailing view appears to be, however, that signature of the Final Act is merely a ministerial step acknowledging that a country participated in the Conference, and that not to sign it would be an insult to Venezuela as the host government.[36]

Moreover, the mere fact of signing the Final Act, which itself does not constitute any binding legal commitment under the Vienna Convention on the Law of Treaties or otherwise, carries important practical advantages. Pursuant to Resolution I on the Preparatory Commission, while only signatories to the Convention will be able to vote,[37] signatories to the Final Act will be entitled to participate fully in the deliberations of the Commission as observers. Thus, signature of the Final Act would allow the United States, or any other country not yet prepared to sign the Convention, to influence the formulation of the rules, regulations and procedures of the Authority by which its activities and/or those of its nationals might in the future be governed.

For some States (*e.g.*, the USSR, Israel, Venezuela), the form of the Final Act, which has not yet been determined, may influence the possibility of their signature. Such questions as whether the Resolutions will be included in or merely appended to it, whether the Final

[36] In addition, of course, not to be present at the signing would have other disadvantages. A State would lose the opportunity, at this last formal meeting, to make an interpretative statement on any and all of the provisions of the Convention to be included in the formal records of the Conference.

[37] A/Conf.62/L.94, *supra*, as modified by A/Conf.62/L.132/Add.1, *supra*.

Act will contain material that might be viewed as interpretive or explanatory, and so forth, may be critical.

C. *Reciprocating States Regime*

At the same time decisions and actions are being deliberated and taken concerning the above matters, the United States and other industrialized States will have to decide what to do with respect to the Reciprocating States Agreement or "Mini-Treaty" and its associated regime. This problem has, of course, now been complicated by the declared intention of President Koh to have the matter taken to the International Court of Justice should the U.S. and its allies proceed to conclude such an arrangement and commence seabed mining thereunder.

In any event, there have been strong indications that some mining consortia would be reluctant to go ahead with full-scale seabed mining on the basis of a Reciprocating States regime in the face of a conflicting Law of the Sea Convention which has come into force or seems likely to do so. Moreover, it is not clear what effect the legal uncertainties of such a situation would have on banks and investment companies called upon to participate in the financing of seabed operations, particularly in view of the competing and potentially more profitable uses for funds in today's tight economies. And it is also unclear whether the governments formerly interested in pursuing the Reciprocating States Agreement, in particular France and Japan in view of their votes on the adoption of the "package deal", will retain their interest, or what the effects of their disassociation from the effort would be.

D. *Signature of the Convention*

At some point down the line, the United States, like others, will be faced with the political decision of whether to sign the Convention. Some States will undoubtedly be ready to take this step in Caracas, indicating their intention to adhere to the new comprehensive regime. Others will most likely take a wait-and-see attitude, limiting themselves to signature of the Final Act at that time.

As regards the United States decision, to some extent it can naturally be expected to be influenced by what certain other States decide to do. The fact that States voted in the affirmative for the "package deal" at the Eleventh Session is not, of course, necessarily

an indication that they will sign the Convention. The fact, on the other hand, that certain other States voted against or abstained does not mean that they may not find ways to resolve their doubts or deem other considerations more compelling. Will the possibility of having the International Tribunal for the Law of the Sea in Hamburg, an international organization at long last located on its soil, be sufficient to cause the Federal Republic of Germany to meet the necessary precondition of becoming a Party to the Convention? And if and when the Falkland Islands crisis cools down, will the United Kingdom feel as compelled to support the United States by continuing to abstain from participation in the new regime? And what may be the incentives for the U.S., the FRG, the UK and other industrialized countries to adhere to the new regime if otherwise the rights and benefits thereunder as well as considerable political advantages, will be enjoyed by the Soviet Bloc in solid league with the Group of 77 (as the Soviet problem with the PIP Resolution should not prevent its becoming a party to the Convention itself)?

Then too, one comes back to the question originally raised here with regard to future uncertainties: that of the role of customary international law. Can non-Parties be bound by the terms of the new Convention, or those which are self-executing, or some of them, even in the absence of consent to be bound in the face of a sufficient degree of international consensus?

E. *Ratification*

The ultimate imponderable for the United States, and other countries with similar constitutional requirements, will be if and when to submit the treaty for ratification. Since this question may depend on so many possible domestic as well as international political developments, it is virtually beyond contingent analysis here.

One further observation is in order. The decisions of the United States and other developed nations whether to ratify or accede to the treaty may have important implications with respect to the financing of the Authority and the Enterprise.

Conclusion

Other than to repeat that—unless significant changes can somehow be secured in the provisions of the Convention or in the attitude of the United States before signature of the Final Act in

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Caracas—the future is bound to be fraught with uncertainties, it is very difficult to reach any objective conclusions in this Committee's Report. The negative observation seems clear that certain important rights sought and claimed by the United States in areas such as freedom of navigation cannot be considered fully secure. But what are the positive contours of the new regime, which may be binding on the United States and others even in the absence of a declared intention to adhere thereto, is a question that will undoubtedly provide stimulus for the fertile imaginations of international lawyers, diplomats and professors for a long time to come.

SEPARATE STATEMENT OF LUKE W. FINLAY

Mr. Finlay asks that his non-concurrence in the report be noted, his primary reason being that he does not feel that the unmet objections of the Reagan Administration to the Convention on the Law of the Sea have been treated with the gravity that they deserve.

SEPARATE STATEMENT OF NORTHCUTT ELY

Mr. Ely dissents from the report, stating that he believes that it reverses the position of the Committee as reflected in previous reports and fails to face up to the real issues in the treaty.

SEPARATE STATEMENT ON BEHALF OF THOMAS A. CLINGAN AND THEODORE KRONMILLER

As they are currently both engaged on behalf of the U.S. Government in matters relating to the LOS Conference and the Convention, Messrs. Clingan and Kronmiller do not wish to be associated with the foregoing report.

[From the Philadelphia Inquirer, Aug. 1, 1982]

Did U.S. Win Treaty Battle but Lose the War?

(By Robert R. Frump)

International business concerns in the United States, including owners of oil tankers, are questioning whether President Reagan has inaugurated a new era of uncertainty on the high seas as a result of his decision to withdraw from the international Law of the Sea Treaty negotiations.

The United States was the only major nation not to sign the treaty after 16 years of negotiations. In April, 130 countries agreed to the terms, presenting the real possibility that almost all U.S. allies may come under the treaty, some experts say.

The agreement is designed to regulate fishing rights, environmental protection, 200-mile "economic interest" zones, navigational matters and ocean mining at sites far beyond the territorial waters of any nation.

It would establish a Seabed Authority to regulate deep-sea mining, and a "parallel" system of exploitation under which private and international organizations both have rights to mine minerals on the ocean floor.

The United States will not join in the agreement, forged under the auspices of the United Nations, because the treaty unfairly and unrealistically regulates deep-sea mining enterprise and technology while ignoring the rights of free enterprise, President Reagan said in a formal statement issued July 10.

Increasingly, however, critics say that the United States may stand ideologically pure and pragmatically shackled by the decision to remain outside the treaty.

The President's own appointee as deputy chairman to the U.S. treaty negotiating team has called for a lobbying effort to change Reagan's mind, led by "the wider business community, not just a handful of mining companies, but scores of U.S. corporations with far-flung global interests and a direct concern with the risks presented by isolationism."

The United States should reject a position of protecting "pure conservative ideology," said Reagan appointee Leigh S. Ratiner, and embrace one that protects the interests of U.S. businesses abroad. Those interests—particularly those of ship owners—are clouded now.

"'Unclear' is the best way to describe it all," said William M. Benkert, president of the American Institute of Merchant Shipping, which represents most owners of tankers flying U.S. flags. "We are going to be outside the fold on the world's waterways, so if somebody tries to put the arm on U.S. flagships, can they do that because we are not part of the treaty?"

What laws do apply? A form of international common law determined by custom? Or, as Benkert fears, will coastal countries harass United States tankers on environmental issues and challenge the rights of cargo and military ships to pass through straits governed under the treaty? Such organizations as Sealand Services Inc., a major U.S. cargo ship line, and the transportation departments of several other major oil companies fear that those questions represent real dangers.

Many other critical questions about the rejection of the treaty come from Ratiner, a self-described conservative and a partner in the Washington law firm of Dickstein Shapiro & Morin. He was chosen by the President to serve as deputy chairman of the U.S. delegation to the Third United Nations Conference on the Law of the Sea. His assessment of the rejection differs from President Reagan's assurances that all is well and little will change.

Has America sacrificed a position of world leadership, standing idly by as its chief allies move to embrace the treaty?

Has it abandoned bountiful gains in pragmatic areas on behalf of a handful of mining companies who will not produce for decades—if at all? (Those mining companies include Ocean Mining Associates, of which Sun Co. of Radnor has a 25 percent share.)

And did the United States do all those things when the demands of Third World countries were flexible enough to be shaped into an acceptable agreement?

Ratiner, writing in a recent issue of Foreign Affairs, raised all those questions, and suggested that the United States still might gain important and acceptable concessions on the Law of the Sea Treaty in September, when a final draft comes up before the conference.

That would only happen, he said, if business interests not connected with mining but with "a direct concern with the risks presented by isolationism and worsening U.S. relations with the Third World . . . enter this policy debate and make their views known forcefully."

Ratiner agreed with the Reagan administration that Third World countries had imposed conditions on the treaty that were unacceptable for the development of deep-sea mining. U.S. corporations and international consortiums dominated by the United States have been leaders in technology and site development. Some points of the treaty dictated by the Group of 77, a bloc of Third World countries, seemed designed to scuttle ocean mining—not encourage it.

The fear among developed nations has been that Third World countries, in suggesting that deep-sea resources are the "common heritage of mankind," actually had in mind the wholesale appropriation of U.S. technology and sites. In announcing that he would not sign the treaty, Reagan objected to such thinking and proposals that would allow the treaty to be amended without U.S. agreement and require that technology be transferred to Third World countries.

But Ratiner and others have stated that the conferees were ready to move away from those positions, given a sign that the United States was ready to budge on some of its positions.

"The United States had its golden opportunity [in March]. . . . The rest of the world was ready, willing and anxious to reshape important aspects of the treaty to attract U.S. support," Ratiner wrote.

However, "the United States returned to the bargaining table with instructions to fix every important defect in the seabed mining provisions, in short, to convert the treaty into a 'frontier mining code' in which the first company to stake a claim owns the resources and is not subjected to regulation or management except for the payment of taxes," Ratiner wrote.

". . . The primary U.S. objective, in fact, was the eradication of ideological impurity," he said. "As a result, when the time came for compromise, the United States did not make ideological concessions to the Third World in exchange for pragmatic improvements."

In fact, some of the negotiators at the conference were gleefully attempting to undermine the treaty, according to some published reports. The financial weekly Barron's stated that mining interests were introduced to White House Chief of Staff Edwin Meese 3d by Robert Keating, a member of the U.S. negotiating team.

And in April, when then-Secretary of State Alexander M. Haig Jr. authorized some concessions on the treaty, Keating warned mining interests that the concessions would "further enshrine the principle of the New International Economic Order. . . . On the brighter side of things . . . the Reagan administration will have compelling reasons for not signing the treaty," Barron's reported.

Concessions began flowing after Haig's action. Conferees showed signs of converting the objectionable technology-sharing from a legal to a moral responsibility. The United States was guaranteed a seat on a policy-making council. Companies were guaranteed "grandfather" rights to their sites, that is, rights that existed before adoption of the treaty for sites owned before the document was signed.

Nevertheless, a few days later, on April 30, the United States was the only major power to vote against the final treaty. France and Japan voted for it. The Soviet Union abstained, but is believed ready to join. West Germany and Britain have abstained—but Ratiner believes they may sign the treaty soon.

Only Venezuela, Israel and Turkey joined the United States in voting no.

"The administration was fixed on illogical ideological points rather than pragmatic points," said Lee Kimball, executive director of Citizens for Ocean Law. "It is not a good idea to cut oneself off from the outside world so completely."

Ms. Kimball fears that the United States must now negotiate individual understandings with friend and foe alike to clarify such matters as passage through strategic straits and economic offshore rights ranging from commercial fishing to offshore oil exploration and exploitation. Otherwise, the vagueness of law may ensnarl the financing of business ventures. To reach firmer understandings without the treaty, the United States may have to trade political capital with individual nations.

The Reagan administration has stated that the United States would maintain existing rights or gain new rights under the treaty as a result of customary law. That assumption does not necessarily follow, Ratiner said.

For example, he said, Spain theoretically might deny to the United States the treaty rights of passage through the Straits of Gibraltar. Unfriendly coastal states might now harass U.S.-flag oil tankers on environmental grounds. Arab countries might "be tempted to seize on U.S. non-participation in the treaty as an excuse to attempt to limit our activities within their economic zones."

The idea that the United States would be able to negotiate "mini-treaties" with its major, mining-oriented allies also might be flawed. Ratiner said that in signing the treaty, ratifying nations have pledged to challenge in international courts any mining ventures launched under such authority.

"My view is that the chances the court would declare it [a mini-treaty venture] illegal are not just substantial, they're preponderant," said Elliot Richardson, the former attorney general and former head of the U.S. delegation to the Law of the Sea Conference.

The whole hullabaloo over deepsea mining may overemphasize the importance of the industry to begin with. Although potential assets are estimated in the trillions, that potential shows little chance of being realized soon.

It will be hampered by an era of depressed metal prices and scarce financing, with uncertain undersea mining technology and good supplies of most land-based minerals. Deep-sea mining ventures are decades away from becoming reality.

If and when they become realistic goals, the United States may watch as mining corporations migrate to the flag of a country that signed the treaty to assure the certainty of the corporation's mine title. Ratiner believes even more may be at stake.

"If the Western industrialized powers, minus the United States, join the Soviet bloc and the Third World, they will create an historic global organization—one which for the first time regulates, manages, and produces globally shared resources. . . . Should all this occur without American influence, participation and leadership, our nation will suffer a much more serious adverse precedent than any of the adverse precedents we fought against in the treaty negotiation itself.

"We will stand as the emperor without clothes—for the entire world will see that it can do amazing and stupendous things without American money, leadership or technology.

"In short, the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Conference, but the United States may lose a very important war."

[From the Washington Report, July 27, 1982]

Alternatives to Sea Treaty Won't Work, Experts Say

(By Carole Long)

Two U.S. experts on the Law of the Sea Treaty have criticized the administration's pursuit of alternatives to the accord.

Elliot L. Richardson, chief U.S. delegate to the Law of the Sea Conference under the Carter administration, and Leigh Ratiner, deputy chairman of the Reagan administration's delegation to the conference, said they do not believe U.S. companies would mine the mineral-rich seabed under the alternatives.

The two men made their remarks at a House Merchant Marine and Fisheries Committee hearing.

The sea treaty, drafted during eight years of negotiations among 151 nations, would establish international rules on deep-seabed mining, navigation and overflight rights, sea boundaries, marine mammal protection and pollution.

Nations will have their first chance to sign the treaty at a conference in December in Caracas, Venezuela. It will go into effect one year after 60 nations ratify it.

The administration decided in early July not to sign the treaty. Since then, it has begun negotiating a separate multilateral agreement on mining claims rights with the United Kingdom, Germany, Japan and other industrial countries. The accord is known as the Reciprocating States Agreement [RSA].

The administration has also begun processing applications from American-based mining consortia for licenses to conduct seabed-mining exploration. The Deep Seabed Hard Mineral Resources Act, passed in 1980, allows companies to undertake such activity with or without an international agreement on mining.

Richardson said U.S. government surveys, including a recent report by the General Accounting Office, have concluded there will be no "mini-treaty," such as the RSA, because U.S. allies will not sign one.

Ratiner said a U.S. permit issued outside the treaty to allow companies to mine "is a worthless piece of paper which no commercial, publicly owned bank could use as a basis for extending credit."

If the treaty is signed and ratified by 60 nations, "such a license or permit would be in conflict with a widely accepted international treaty and would surely be contested in international judicial proceedings," Ratiner said.

In 1980, Richardson urged passage of the seabed act that set up the licensing process. But he said he "never believed there would be a nickel invested in mining under the legislation."

He said he supported that legislation because it was needed as a bargaining chip in negotiations on the Law of the Sea Treaty.

Both Ratiner and Richardson said an American company that wants to mine the deep seabed will have to do so by participating in an expedition run by a foreign country that has signed the treaty.

Ted Kronmiller, deputy assistant secretary of state, disagreed with Ratiner and Richardson. He told committee members that the administration believes U.S. companies will be able to mine under domestic law or with the agreement of other countries.

He said he recently polled the four mining consortia that have applied for licenses to explore, and three said they believed they could operate under the U.S. law.

Ocean Mining Associates, a Virginia-based consortium, said it is prepared to operate outside the treaty and will not mine under a foreign flag, Kronmiller said. The other companies have not yet made a decision.

[From the Providence Journal, July 6, 1982]

U.S. Runs Risk of Isolation in Seabed Treaty Stand

EDITORIAL

Although the United States voted against adoption of the Law of the Sea Treaty, which was approved by an overwhelming majority of nations after nine years of negotiations, a U.S. role is not yet foreclosed.

Opponents of the treaty in this country are attempting to advance a mini-treaty among the industrialized nations, but such an effort seems doomed to failure. And if the U.S. government is not wary, it may find itself left behind a grand isolation while the rest of the world signs the treaty and reaps the benefits.

That—curiously enough—is the view of the man who was deputy chairman of the U.S. delegation to the final negotiating session of the LOS Conference last spring. Leigh Ratiner, a veteran of some previous sessions, was engaged by the Reagan administration to help in advancing its demands for changes in the draft treaty. Now that the fight is over, he has concluded that too rigid an ideological position by administration policy controllers prevented the practical bargaining necessary to a better outcome.

Mr. Ratiner is a conservative who sympathized with the objections of the Reagan administration toward the draft treaty. But he points out in an article in the current Foreign Affairs magazine, that "the dilemma for the United States now goes far beyond the specific flaws" in the treaty. In time, all the other nations, including our allies, will sign and ratify the treaty, he says, because "they see a long-term future" in it.

Then, he says, "we will stand as the emperor without clothes—for the entire world will see that it can do amazing and stupendous things without American money, leadership or technology." American companies would have to do business under foreign flags in order to get the legal protection of the treaty.

The draft treaty provides that the countries with seabed mining companies ready to start work can, and indeed must, agree on mini-treaty to resolve overlapping claims. But they can gain global approval only after signing the main treaty. There is no question of leaving the Third World out of consideration. Under the treaty terms, Third World countries eventually will benefit from profits of the Seabed Authority and its own seabed mining operation.

Opponents of the treaty fear that it would become an entering wedge for the New International Economic Order that the developing nations have been seeking, in which the rich nations would cede some of their wealth to the poor countries. But Mr. Ratiner's judgment is that "the costs of isolation are far higher than the costs of accepting some of the rhetoric and principles of the North-South dialogue."

He suggests that some small changes might be made by consensus at a session in September to accept final drafting of treaty language. But that would require a concerted effort by the United States and a conciliatory attitude toward the very nations it had previously irritated by its hardnosed tactics.

In any event, U.S. officials should keep the door open to eventual signing, even if they decide to boycott the signing session at Caracas in December. Otherwise, irreparable harm could be done to long-range U.S. interests.

[From Barron's, July 26, 1982]

Underwater Treaty—The Fascinating Story of How the Law of the Sea Was Sunk

(By Daniel D. Nossiter)

President Reagan's announcement this month that the United States would not sign the far-reaching and dauntingly complex Law of the Sea Treaty caught no one by surprise. Hammered out over nine dreary years by most of the world's nations, the agreement, even its fiercest American advocates admit, is replete with features contrary to the loosest definitions of free market principles.

The President's action will have no economic impact now and perhaps none in the future. Deep-ocean mining—one of the treaty's primary concerns—is decades off and may never prove economically attractive to U.S. companies.

Yet how the decision was made is a largely untold tale, rich in intrigue, power struggles and political thrust and parry. While the U.S. was ostensibly negotiating in hopes of producing an acceptable draft of the treaty, so say knowledgeable sources, some key government officials were working to ensure that nation would reject any proposal. Combatants include high Administration officials such as then-Secretary of State Alexander Haig, who was seeking a palatable compromise on the pact, and White House Counselor Edwin Meese, who apparently was determined that there would be no agreement.

When Reagan came to office last year, the United Nations Conference on the Law of the Sea, consisting of every member of the world body, had drafted a treaty to divide the oceans' mineral, oil and fishing wealth and to guarantee navigation rights through the globe's dozens of strategic straits and narrows. Most of the draft's terms were agreeable to the new Administration, since they merely codified long-accepted international maritime principles.

However, the provisions for mining the deep sea beds were another matter. Back when the world was young, undersea volcanoes spewed up bits of manganese laced with copper, cobalt and nickel. Over millennia, these metal bits grew. Today, they are potato-sized nodules lying 15,000 feet down and hundreds of miles beyond any nation's territorial water. The UN conference declared this wealth—potentially worth trillions of dollars—the "common heritage of mankind" and prepared a ponderous bureaucratic mechanism to administer its exploitation.

The new men in Washington smelled an ideological rat, with the Third World doing the talking while the industrialized nations handed over Western technology and wealth. Ideology aside, the actual provisions were guaranteed to scare off most investors capable of raising the financing and developing the know-how and equipment to dredge up those precious nodules.

Despite the problems associated with deep-sea mining, several international combines, some registered in the U.S. (see table) have expressed interest in such ventures on a long-range basis. They're hedging their bets, on the assumption that such operations will make economic sense one day. Companies like Kennecott and U.S. Steel indeed have already invested tens of millions of dollars to explore potential mine sites and develop pilot technology.

Under the original terms of the treaty, these companies would be forced to surrender the claims they'd staked out. Worse, they'd be required to "transfer" their patents for deep-sea mining technology to a world organization, splendidly misnamed "Enterprise." The Enterprise, with the money it raised through licensing fees—$1 million a year per mine site—would finance Third World countries' purchases of the technology. Too, for every site discovered by a Western consortium, the companies would be obligated to search for a second site which, if found, would also be handed over to the Third World group. Enterprise also would set mining production limits. Finally, the US. would not have a guaranteed seat in the world cartel.

Two months after taking office, Reagan asked the UN to halt its deliberations until his Administration had time to study the proposals. Last January, the President announced the U.S. was ready to negotiate. The negotiating team had broad instructions to seek six major changes in the treaty. Chief among these was that the treaty "will not deter development of any deep-sea bed mineral resources to meet national and world demand" and that the U.S. will enjoy assured access to the strategic metals and a guaranteed vote in the mining authority. Administration officials hinted something should be done about technology transfer requirements as well.

Meanwhile, American mining interests were far from idle. David Stang, a Washington lawyer representing the Lockheed/Standard Oil of Indiana consortium, and Jeffrey Amsbaugh, an executive with the U.S. Steel/Sun Co. consortium, began to

plot an end-run around the American negotiating team. Some Administration officials viewed the effort sympathetically. As Leigh Ratiner, the Deputy Chairman of the U.S. Delegation to the treaty conference, contended in a recent *Foreign Policy* article, the Deputy Assistant Secretary of State for Ocean and Fisheries Affairs, Theodore Kronmiller, felt the treaty was fundamentally flawed and could not be salvaged. (At Congressional hearings last week, Kronmiller indicated that the U.S. is willing to go it alone on ocean mining, although it hopes to set up a mini-treaty with other nations dissatisfied with the UN pact.)

In any case, Amsbaugh says, in early February several of the international consortiums had a go at agreeing among themselves how to divide up the mining sites. According to Amsbaugh, the one French-led and four U.S.-led consortiums had secretly agreed by end of March on an arbitration process and a confidentiality arrangement on technology which has been signed by all but one of the five.

The assumption was that this could lead to a sort of mini-treaty signed by the concerned Western industrial nations, which would give adequate legal title to the mine sites, a crucial factor in obtaining financing for projects estimated at $1.5 billion a shot. However, even if the Western nations were to come to terms among themselves—which seems unlikely, in light of the strains underscored by France's announcement last week that it would defy the Reagan Administration's ban on providing U.S-licensed technology to the Soviet-European gas pipeline project—legal title to the mine sites could still remain cloudy. On this score the President of the Law of the Sea Conference, Ambassador T.B. Tommy Koh of Singapore, has promised that any non-signatory country that attempts to set up mining operations will be challenged in the International Court of Justice in the Hague—whose authority the U.S. recognizes.

American proponents of the mini-treaty in the Administration and industry claim the Hague would vindicate a mini-treaty's legal claim. Elliot Richardson, the one-time attorney general who is the former head of the U.S. delegation to the UN conference, feels otherwise: "Most people who have looked at the makeup of the court conclude that the court would assess that when you have 130 countries setting up a legal regime, a mini-treaty is illegal. My view is that [if the U.S. tries to go it alone] the chances the court would declare it illegal are not just substantial, they're preponderant."

To be sure, the World Court has no battalions. What's to stop U.S. companies from going it alone? Money. Bankers would be reluctant to make loans under a disputed title unless the companies were willing to pledge their assets, rather than the projected cash flow of the mining venture. The companies understandably aren't eager to do that, says James Mulligan, a vice president of Chase Manhattan. An alternative source of funding—government-backed loans—seems a doubtful possibility. An Administration that refused to sign the treaty because of its commitment to the free market would look silly extending such guarantees.

While arrangements behind the scenes for a mini-treaty were proceeding apace, U.S. negotiators at the UN were themselves making progress. On April 3, a Saturday, Haig met in Washington with James Malone, the chief U.S. bargainer, and his deputy, Ratiner. Haig sent them back to New York with what seemed a large concession: agree to production limits. In fact, it wasn't much of a concession at all. The ceilings were calculated according to projections put together several years ago by Inco Ltd., a consortium member, when neither the world economy nor the metals markets were depressed. By April of 1982, with demand limp, there was little danger that the limits would be reached.

Things began to move at the UN after Haig's concession. The vote was to come at the end of the month, and time was running out. With mediation from Canada and 10 other countries, the conferees guaranteed the U.S. a seat on the mining council, guaranteed that the architects of the early mining ventures would retain rights to their claims and, last but not least, offered to turn the obnoxious transfer-of-technology provision from a legal to a moral obligation.

U.S.-REGISTERED CONSORTIUMS INVOLVED IN DEEP-OCEAN MINING

Consortium name and participants	Parent organization	Percentage participation	Nationality of parent
Kennecott Consortium:			
Kennecott Corp	Sohio [1]	40.0	United States.
RTZ Deep Sea Enterprises	Rio Tinto-Zinc Corp.	12.0	United Kingdom.
Consolidated Gold Fields	Rio Tinto-Zinc Corp.	12.0	United Kingdom.
BP Petroleum Development	BP Petroleum Co.	12.0	United Kingdom.

U.S.-REGISTERED CONSORTIUMS INVOLVED IN DEEP-OCEAN MINING—Continued

Consortium name and participants	Parent organization	Percentage participation	Nationality of parent
Noranda Exploration Inc.	Noranda Mines	12.0	Canada.
Mitsubishi Group	Mitsubishi Corp.	12.0	Japan.
	Mitsubishi Metal Corp.		
	Mitsubishi Heavy Industries		
Ocean Mining Associates:			
Essex Minerals Co.	U.S. Steel Corp.	25.0	United States.
Union Seas Inc	Union Miniere S.A.	25.0	Belgium.
Sun Ocean Ventures	Sun Co.	25.0	United States.
Samim Ocean Inc	Ente Nazionale Idrocarburi (ENI)	25.0	Italy.
Ocean Management Inc.:			
Inco Ltd.	Inco Ltd.	25.0	Canada.
AMR	Metallgesellschaft, AG.	25.0	West Germany.
	Preussag AG		
	Salzgitter AG		
SEDCO Inc	SEDCO Inc.	25.0	United States.
Deep Ocean Mining Co., Ltd. (DOMCO)	23 Companies	25.0	Japan.
Ocean Minerals Co.:			
Amoco Ocean Minerals Co.	Standard Oil of Indiana	30.7	United States.
Lockheed Systems Co.	Lockheed Aircraft		
	Lockheed Missiles and Space (Subsidiary of Lockheed Aircraft).	30.7	United States.
Ocean Minerals, Inc.	Billiton BV (Royal Dutch Shell)	30.7	Netherlands.
	RKW Ocean Minerals BV (Subsidiary of Bos Kalis Westminster Group BV).	7.9	Netherlands.

[1] BP Petroleum holds a majority interest in Sohio.

Source: Dept. of Commerce.

The treaty was approaching a palatable form. Still unconvinced of its virtues and adamant on its defects, Stang of Lockheed and Amsbaugh of Sun arranged to meet with White House Counselor Meese. Amsbaugh says that Robert Keating, a member of the U.S. negotiating team at the UN, was "instrumental" in setting up the powwow. Keating had been busy behind the scenes on other occasions as well. During the course of the UN negotiations; he met with executives of several Fortune 500 companies in Dallas, Houston and Washington in an effort to stir up opposition to the treaty he supposedly was negotiating at the UN. On April 15, two weeks before the treaty came to a vote, Keating wrote to members of the business community that "the net result of [the Haig concession] will be to further enshrine the principle of the New International Economic order. . . . On the brighter side of things . . . the Reagan Administration [will] have compelling reasons for not signing the treaty." A copy of the letter was obtained by Barron's.

Asked recently how he reconciled the dual role of negotiator and dual role of negotiator and anti-treaty lobbyist, Keating replied; "I wasn't involved in any conflict of interest, if that's what you mean."

The meeting with Meese took place at the White House on Monday, April 19, at 4 p.m. Also present were Richard Darman, a Presidential assistant who had written an article favoring the mini-treaty concept before joining the White House staff: Marne Dubs of the Kennecott consortium and the only UN treaty advocate; Robert Smiley, Exxon's chief Washington lobbyist; John Paul and Chester Ensign of Amax, and others. According to Amsbaugh, Meese reassured the gathering that the Administration was not straying from its stated objectives. Another industry source, who was at the meeting, reports that Meese wanted the American negotiating team to walk out of the UN then and there, but that he was argued out of the position. Meese has refused repeated requests for comment.

The meeting at the White House underscores Haig's growing isolation from the center of decision-making. Haig was directing his team to continue negotiations at the UN, apparently believing a workable compromise on the treaty was near. But industry representatives had walked away from their meeting with Meese with the sense that the U.S. intended to veto the document come what may.

Haig couldn't be reached for comment; a spokesman said the former Secretary of State is refusing all press inquiries. But Leigh Ratiner, the deputy chief negotiator at the UN, now back in private practice with the Washington law firm of Dickstein, Shapiro & Morin, says that Haig still "believed a good treaty was worthwhile and, after the concessions, we had a ballpark chance at signing the treaty."

Ballpark chance or no, Meese met again a few days later with James Malone, the chief of the U.S. delegation and Michael Guhin, a member of the National Security Council in charge of Global Affairs. Malone could not be reached for comment. But Guhin, through a spokesman, claimed no decision was taken concerning the U.S. position. Asked if he was issued new instructions following the meeting, Ratiner, the deputy negotiator, refused to comment.

On April 30, 130 countries voted for the draft. The U.S. was joined by Israel, Venezuela and Turkey in opposing the treaty. The Soviet bloc, with the exception of Rumania, abstained as did Belgium, Britain, Luxembourg, the Netherlands, West Germany, Spain and Thailand. Most observers feel that the Europeans who abstained will sign the treaty after it's put in final form this fall.

Treaty supporters apparently felt this wasn't the last word from the U.S. Between the time of the vote and Reagan's formal announcement July 9, Ratiner, Elliot Richardson and Ambassador Koh, the president of the UN conference, met with David Rockefeller, urging him to lobby for the treaty in corporate boardrooms. Richardson says the meeting had "long-range objectives." A Rockefeller spokesman, Leslie VanDerzee, insists that Rockefeller has committed himself to nothing.

Treaty advocates claim, and opponents fear, that another Administration one day will sign, possibly on less favorable terms than the Reagan White House was offered.

In any case, deep-sea mining is decades off at best. Mulligan at Chase, who is in charge of financing for mining ventures, says he has been presented with several deep-sea mining proposals. But, "I haven't seen an undersea mining project that can be financed before or after the treaty. The projects are not viable economically, technically or legally."

The technical problems alone are awesome. The method of choice appears to be a stable surface ship trolling a pipe reaching the seabed three miles down and sucking up the nodules like some great vacuum cleaner. The energy required to suck up the metal and separate it from the sea water is tremendous, as are the difficulties in keeping a trailing tube that long from buckling. Too, the richest mine sites are hundreds of miles from processing ports.

Mulligan also points out that even if metal prices weren't depressed, mining for the undersea nodules wouldn't pay now. "There are centuries of copper and nickel left in conventional land mines. Manganese is a little tight, largely because it comes from [politically unstable] sub-Sahara Africa. The same is true of cobalt from Zaire and Zambia, but you don't need much of it."

Furthermore, recent discoveries off the coast of Oregon might make nodule mining needless for U.S. companies under any circumstances. Conrad Welling, an executive with the Lockheed consortium, reports the movement of the earth's tectonic plates beneath the sea there has created vents from which flows lava rich in copper, zinc and nickel. "They form so fast, it's a possible renewable resource."

Apart from the mining provisions, the U.S. is likely to enjoy the fishing, oil and navigation privileges without signing the treaty as a matter of customary international law. Since mining the deep seabeds is unattractive anyway, the Administration appears to have made its point at little immediate economic cost. Or, as one American negotiator puts it: "They wanted to have their cake and eat it too." It seems, for now, they have.

[From the Journal of Commerce, Apr. 30, 1982]

Ratiner, Powerhouse of Persuasion, Lays Seabed Mining Talks To Rest

(By Ruth Pearson)

United Nations.—Leigh S. Ratiner has just negotiated the most controversial section of the world's first comprehensive Law of the Sea treaty. It lays down regulations governing ocean mining in international waters.

He lit a cigarette, sucked in the smoke, squinted at the carpet on the floor of his New York office, then explained how a negotiator gets what he wants.

"I first find out what you want," he said, "and why you want it. Then I figure out how to give you what you want with the least possible giving away of what I want."

The former lobbyist turned State Department delegate to the U.N.-sponsored conference negotiated the complex clauses of a revolutionary concept—an international ocean regime to oversee deep seabed mining.

It is a business that could make large profits for the multinational industrial consortiums and government companies that get in on the ground floor. The ocean's dark depths contain such rich mineral deposits that future decades may find the competition for resources transplanted from land to sea.

With so much at stake, the interests involved in codifying the treaty, which is expected to be adopted today at the United Nations, weigh heavily on all of the negotiators. A careless comma or a misplaced asterisk could cost millions of dollars.

But after eight conflict-filled years and thousands of hours of cajoling in smoke-filled conference rooms and arm-twisting along carpeted U.N. corridors, the treaty-writing has ended.

The most difficult part, Mr. Ratiner related, was not the back-room bargaining with the other negotiators. "They understood the dynamics of a multilateral conference where all 155 countries have got to be satisfied.

"What is particularly difficult for the U.S. delegate," he went on, warming to his subject, "is that he is always negotiating with his back-home constituency, which is itself divided."

That constituency does not always comprehend the way negotiations work, Mr. Ratiner said. "Not being here, they cannot appreciate the pressures put on the negotiator."

Mr. Ratiner's constituents during the treaty negotiations included not only the mining consortiums and the industries that supply them but also arms of government with often conflicting interests.

There is the Defense Department, which is anxious to obtain a treaty that guarantees rights of navigation and overflight around the globe, and the State Department, which must weigh the political impact on relations with more than 150 governments and agencies with other interests to protect, from fisheries to shipping, environmental concerns, etc.

Beyond them are the senators who must ratify the treaty and the ultimate constituency, the voters in future elections.

The kinds of texts that have to be negotiated frequently must be drafted in an attempt to accommodate such disparate points of view without giving away anything important, he said, holding his palms up in a gesture implying near hopelessness.

"Unless you can be with them, walk with them through the text, their first impression is that you have given it all away," he said. But once he has explained to his constituents what the commas and the cross-references mean, their hostility wanes.

He does have serious enemies, however. "People credit me with being some kind of Machiavellian character—to which credit I am not fully entitled, he noted with a lack of displeasure.

"A handful of people in Washington have been ideologically committed to the destruction of this treaty, and they have been the ones who have been going after me."

He smiled. "They feared that somehow I would get this treaty successfully negotiated."

Whether the treaty will be considered a success or not now will be up to the president and the Congress. Most observers agree, though, that Mr. Ratiner managed to extract more benefits for the United States from the conference than seemed even remotely possible a year ago.

Those who negotiated with him say he is a powerhouse of persuasion. He can use soft-sell when you expect abrasiveness or vice versa; he can cover the self-confident or come at you purring, "Trust-me-because-I'm-all-you-have," leaving your defenses devastated.

The important thing for a negotiator, he said, "is to establish your credibility with your adversary, that you can be trusted—first, to always tell the truth, and second, to always be able to deliver what you promise to deliver and never promise anything that you can't deliver."

How did he learn the art of negotiating? "I grew up in Brooklyn," he answered quickly, "and that provides good instincts for negotiating." Then he added, "Just living in New York is a negotiation."

He began as a young lawyer in the Pentagon Department at a time when the world had long accepted the concept of territorial waters extending just three miles from each nation's coasts. Suddenly, Chile, Ecuador and Peru asserted jurisdiction over 200 miles out to sea.

"I was a civilian lawyer in the office of the secretary of defense and I was asked to step in and do something to stop the proliferation of these 200-mile claims," Mr. Ratiner recalled.

Then the idea of the Law of the Sea conference was born. "Once the conference began, it was obvious that neither the United States nor the Soviet Union would accept the 200-mile territorial sea."

Negotiations began on a vast, complex treaty—more far-reaching in its legal precedents and the new international institutions it creates than anything since the Charter of the United Nations in 1946.

Now the negotiating has ended, and the treaty faces the beginning of a bitter campaign against it by its opponents.

"If it is a good treaty," one of its authors—Mr. Ratiner—said, "there will be considerable pressure from very responsible people both in industry and in government to support it." In that case, he foresees that those who oppose it will be isolated.

Does public support help? "It does if you have done a good job. Opposition is helpful in a democracy if you have done a bad job."

Two years ago, Mr. Ratiner was one of the principal lobbyists against the U.S.-Canada fisheries treaty. "In the judgment of my clients," he said, "it gave away important U.S. fishing rights. That was a case where opposition to the treaty was in the national interest. It helped save the United States from adverse results."

He hopes the American public will work in its usual way with regard to the Law of the Sea Treaty and that the balance of pressures in Washington will be reasonable.

Even if it is a good treaty, it has to be explained.

"There are many steps to be taken to put a treaty through the Senate together with implementing legislation, which will have to go through the House of Representatives," he said.

How long it takes before the treaty passes depends on how good the treaty is. And even if it is, from the United States' point of view, a magnificent treaty, it needs a selling job.

It will take a top lobbyist to outtalk the opposition's top lobbyists. Mr. Ratiner might be that man. He was previously Kennecott Copper Corp.'s anti-treaty lobbyist before he was hired by the State Department to negotiate the same treaty he had opposed.

He compares lobbying in Washington to the Law of the Sea Conference. "If you understand it, you develop over a period of time the instincts for how it can be worked, who has to pressure whom when, what's a good time, what's a bad time, how far you can go, how important it is to do your homework, to get your facts right. It is really an organizational and management problem."

Contacts and who knows whom definitely are not what it is all about, he emphasized.

"For any given issue in Washington there are probably 200 vital players. You can't know them all. What you can do is create a strategy and begin to find ways of putting together the right people at the right moment with the right ideas."

Although Mr. Ratiner's job with State ends today the day the treaty is expected to be adopted, he might be kept on to lobby in favor of the treaty. He did not comment on the prospect except to say that "what the government needs is for the government to decide."

But he offered some advice. "They are going to need somebody to sell this treaty, somebody who knows and understands it, if they like it," he said, almost vehemently, "then they have to sell it."

[From the Washington Post, July 22, 1982]

Sailing the Sea Treaty Shoals Without the Lighthouse of Fact

CABAL

(By Mary McGrory)

The President's penchant for not confusing himself with the facts is well known. In the case of the Law of the Sea Treaty, he seems to have gone to exceptional lengths.

Washington Post Staff Writer Lou Cannon has passed on what President Reagan said at the National Security Council meeting at which he decided not to sign a treaty that covers two-thirds of the world's surface and took 14 years to negotiate:

"We're policed and patrolled on land, and there is so much regulation that I kind of thought that when you go out on the high seas you can do what you want," he said, proud apparently that no data clogged his mind.

To preserve his ignorance, Reagan never consulted the man who could have set him straight. Elliot L. Richardson, appointed by Jimmy Carter as a representative to the Law of the Sea Conference, spent four years negotiating the draft convention.

Richardson, a notoriously able and proper Bostonian, indispensable to Richard M. Nixon until 1974 when he refused to fire Watergate Special Prosecutor Archibald Cox, never got closer to the Reagan throne than Counselor Edwin Meese III, whom he saw a year ago.

Meese, whose approach to complex foreign policy questions is acceptably ideological, presided over a fatal meeting at which the decision was effectively made to scuttle the sea treaty.

Ironically, initial impetus for the Law of the Sea came from Reagan's favorite government department, Defense. The Joint Chiefs of Staff were anxious to secure international agreements for safe passage of submarines through straits and coastal waters.

But, as the president indicated, the very idea of anything being put beyond the grasp of U.S. business interests is anathema. Almost immediately after taking office, he ordered a review and fired leaders of the U.S. negotiating team. They were suspected of having been "seduced" by long exposure to subversive elements in the United Nations, under whose auspices the Law of the Sea Conference had been laboring since 1966.

The U.N. view of the sea as "the common heritage of mankind" was dangerous nonsense to Reagan. The notion that we would compete with uppity Third World countries for rights to mine the seabeds was an affront. Reagan felt that proposed establishment of an International Seabed Authority was the most unconscionable aspect of the whole contraption.

Some in inner White House councils advocated outright U.S. withdrawal from the conference. They lost, but not really. According to Leigh Ratiner, a former lobbyist for Kennecott Corp. and Reagan's handpicked choice to bargain for a better mining deal, the Reaganites gave him such rigid instructions that he was practically forbidden to make small concessions that would have led to genuine compromise and advantage. He was under secret orders to bring about a "frontier mining code" for the bounding main.

On April 30, the United States was one of four countries to vote against the Law of the Sea. We have not been as isolated since we cast the world's sole nay vote last year against adoption of the code covering infant formula.

What Reagan ended up doing, in the minds of most of the world, was shooting himself in the foot. He has succeeded in excluding U.S. interests from mining rights he thought he was protecting.

Triumphant treaty opponents have assured U.S. miners that they can ignore the treaty and make "mini-treaties" with their allies.

Not so, Richardson says. If he had been given a chance to explain the realities to the president, he says, he would have told him that there "will be no U.S. undersea mining outside the treaty, except under a foreign flag."

As a practical matter, claims outside the treaty would be subject to litigation in the World Court, making banks leery of loaning the vast sums needed for such enterprises.

Richardson says he would also have explained, had he ever made it to the Oval Office, that the United States cannot expect to boycott the treaty and take for granted navigational safeguards under international law—"We cannot pick and choose among rights and obligations."

Under Reagan, the pro-treaty defense line broke. Pentagon ideologues held that strategic minerals under the seabed constitute "national security" interests. In the "damn the treaty" spirit, Navy Secretary John F. Lehman Jr. said, "We can blast our way through the straits."

Richardson tried to express cautions to national security adviser William P. Clark, who suggested that he deal with a staff member.

This week, Richardson went before a House committee studying the treaty wreckage. Several conservative members questioned his patriotism and intelligence for having participated in an international cabal against U.S. business. He replied tartly that, having been considered fit to serve in four Cabinet posts, he did not regard himself as either stupid or subversive.

He does not think the treaty is sunk forever. Another administration may reconsider.

Who knows? Another president might even ask him about it.

[From the Journal of Commerce, July 21, 1982]

U.S. Sea Treaty Stance Attacked

(By Helen Ericson)

WASHINGTON.—American companies will lose direct access to the sea's vast mineral riches unless the United States signs the Law of the Sea Treaty, two former U.S. conference representatives warned.

Elliot L. Richardson, former ambassador to the Law of the Sea Conference, told the House Merchant Marine and Fisheries Committee that "the treaty is our only means of assured access to the strategic minerals of the deep seabed."

Leigh S. Ratiner, former deputy chairman of the U.S. delegation to the conference, joined Mr. Richardson in warning further that U.S. law does not give an American company the legal right to mine the seabed.

Defending the administration's refusal to sign the treaty was Ted Kronmiller, deputy assistant secretary of state, who appeared in place of Assistant Secretary James Malone.

Under critical questioning from several committee members, Mr. Kronmiller said, "There is a prospect for mining under U.S. law" without signing the treaty.

Mr. Kronmiller said he supports reauthorization of the applicable statute, the Deep Seabed Hard Mineral Resources Act of 1980.

After 10 years of negotiations, the treaty was adopted by a vote of 130 in favor, 4 against and 17 abstentions.

On July 9, President Reagan announced his decision not to sign the treaty.

Mr. Richardson, now chairman of the Department of State Public Advisory Committee on the Law of the Sea, disagreed with what he said was the administration's hope that a separate treaty would be signed by U.S. allies.

Surveys done by the U.S. government and the General Accounting Office show "there will be no 'minitreaty' for the simple reason that our allies will not join one," Mr. Richardson said.

He added that the surveys also predicted U.S. companies will not risk operating under domestic legislation.

"The reason is clear. Domestic U.S. law cannot give anyone a secure legal right to exploit a defined area of the seabed. Without such a right good for at least 20 years, no rational investor will gamble $1.5 billion on a deep-seabed mining project," Mr. Richardson contended.

He told the committee that an American company will have one choice without the treaty—to operate under the flag of a member country.

Mr. Ratiner, now a partner in the Washington law firm of Dickstein, Shapiro and Morin, observed he suspects some mining companies may ask Congress to amend the Deep Seabed Hard Mineral Resources Act so they can fly foreign flags.

He suggested committee members consider whether they should continue to authorize appropriations under that law since it may no longer be relevant to American mining companies.

Mr. Richardson referred to what he said was revival by industry officials of the idea of a government guarantee against loss.

But it is possible that the International Court of Justice eventually will declare illegal any deep-seabed mining activity outside the treaty, he added, so a U.S. government guarantee would have limited value.

A statement submitted by Assistant Secretary of State Malone, who is the president's special representative at the conference, maintained that the treaty would discourage private investment in seabed mineral production.

A new, or pioneer investor, would come under heavy financial obligations, he said, including payment of a $250,000 registration fee; a $1 million annual fee and another $250,000 for processing a plan of work.

[From the New York Times, July 13, 1982]

That (Not So) Awful Sea Treaty

You wouldn't know it from the headlines, but President Reagan finds real merit in the Law of the Sea Treaty he won't sign. Yes, the seabed mining provisions are distasteful, especially that business about resources being the common heritage of all mankind. But embedded in the President's rejection is the quiet and telling assertion that the sea treaty "contains many positive and very significant accomplishments."

As Mr. Reagan explained: "Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations. This is an important achievement and signifies the benefits of working together and effectively balancing numerous interests."

No treaty supporter would claim more for the compromises it took a decade to reach. America clearly wants those benefits, including unimpeded naval passage through 115 straits and a uniform 12-mile territorial limit. The interesting and important question now is whether the United States can have it both ways—stay out of the proposed international mining code and still reap the benefits it wants.

To a considerable degree, it probably can. Americans may be able to use their substantial diplomatic and economic power to gain bilaterally with most nations the desirable provisions that the treaty confers multilaterally. Even if not universally ratified, the treaty fixes new norms that good lawyers will cite as constituting "customary international usage," like a recognized right of way. This much can be conceded to the conservatives who insisted on rejection.

What should not be conceded is their corollary proposition: that the seabed riches are there for the grabbing if the United States signs a less sweeping treaty with its Western partners. They contend that there is no need for a global sea-law bargain with the third world; the industrial countries can always form their own club to mine the seabed nodules of cobalt, manganese and other strategic minerals.

This impractical thesis is challenged by none other than Leigh Ratiner, the deputy chairman of the Reagan Administration's Law of the Sea delegation. Writing in the current Foreign Affairs, he says that no mini-treaty could give investors the secure title they require before sinking millions into the seabed. He insists that if the Administration had made a good-faith negotiating effort, it could have ameliorated the mining provisions of an otherwise ratifiable treaty.

That argument was vain, and an American diplomatic venture of four Presidents now ends with the United States in lamentable isolation. Why? Because free-market ideologues persuaded Mr. Reagan that it was offensive and unnecessary to share the profits of seabed mining with third-world nations that have not mastered the technology. The sea was to them not the common heritage of mankind but just so much more territory, to be staked out by the strongest.

As Mr. Ratiner observes, the decision to stand apart only defers American participation to a day when "the rules of the game will already be set and our industrial competitiors . . . will have gained by then major political and economic advantages." An Administration that talks loudly and often about strategic minerals has made a strategic blunder.

[From the Christian Science Monitor, July 13, 1982]

Adrift From Sea Law

THE MONITOR'S VIEW

President Reagan has cut the United States adrift from the international community by announcing that he will not sign the Law of the Sea Treaty adopted by 130 nations this year. The question is whether the U.S.—and its seabed mining companies—will be able to do better for themselves by going it alone on seas charted by others.

The prospects are so negative that a future president is likely to sign the document if only to reduce the endless litigation in seeking to claim U.S. rights under a treaty to which it is not a party. And this final document may be less favorable to U.S. interests than it could have been if Mr. Reagan were to keep trying for improvements instead of abandoning U.S. participation except on what he calls a technical expert level.

Some adjustments are still possible during the Law of the Sea conference's final considerations before signing begins in December. These could help to ensure agreement by other nations with lingering doubts, leaving the U.S. further isolated.

What does it matter? Won't the U.S. be able to take advantage of all the treaty provisions it has supported over these many years of negotiation—items to do with pollution control, fishing rights, free passage for military vessels, to name a few?

The Reagan administration evidently believes the answer is yes on the assumption that these will fit into customary international law. But there is a contrary opinion that the treaty could be regarded as a contract, with certain benefits as well

as responsibilities applying only to the contracting parties. U.S. interests could languish while courts are sorting the matter out.

What of the treaty regulations on commercial exploitation of seabed minerals to which the Reagan administration has particularly objected? Will U.S. companies be exempted from these? Again, litigation looms. To avoid it, U.S. companies might have to go to countries that are parties to the treaty. Thus direct U.S. access to strategic minerals could be compromised.

But couldn't the U.S. enter into a mini-treaty with other seabed miners such as Britain and France and avoid getting involved with the whole spectrum of the third world? The treaty itself authorizes a mini-treaty for countries with mining claims, but only among signers of the new Law of the Sea Treaty, deterring them from joining alternative treaties, such as one with a nonsigning United States.

Surely Mr. Reagan was aware of such questions when he reached his decision not to sign. They have been raised not only by the longstanding nongovernmental advocates of the treaty but by the conservative lawyer who served as deputy chairman of the U.S. delegation to the final negotiating session, Leigh Ratiner.

Indeed, Mr. Ratiner looks beyond the effects on America's sea interests. In the current Foreign Affairs he warns of a long-term foreign policy setback to America's influence in international economic and political matters once the rest of the world sees that it can put together and operate such a far-reaching treaty without American participation and leadership. Such a loss would be far worse than any of the restrictions on American operations that the Reagan administration resisted so strenuously in the treaty.

No one would want a presidential decision written in water. Yet must it be carved in stone?

Perhaps, even without U.S. leadership, the final adjustments in the treaty will permit the President to reconsider.

[From the Washington Post, July 18, 1982]

Riches of Sea May Elude United States

REFUSAL TO SIGN TREATY PUTS AMERICAN PROSPECTS IN DOUBT

(By Thomas W. Lippman and Nancy L. Ross)

President Reagan's announcement that the United States will not sign the Law of the Sea Treaty has thrown a cloud of uncertainty over the long-term prospects for American participation in seabed mining.

Many experts believe that the American mining and petroleum companies that opposed the treaty and its provision for international control of seabed minerals may have overplayed their hand and dealt themselves out of a game they had hoped to dominate.

The stakes of the game are enormous. A lode of manganese nodules worth hundreds of billions of dollars is believed to lie three or more miles down on the ocean floor. And the recent discovery of polymetallic sulfide deposits in the Pacific offers the potential of further mineral riches, according to Amor Lane of the National Oceanic and Atmospheric Administration.

If the United States stands alone among nations in refusing to participate in the international program, these experts say, American corporations may find it legally and financially impossible to undertake the complex, expensive task of bringing up the billions of dollars worth of manganese, nickel and cobalt and copper found in nodules on the ocean floors. They say companies such as Lockheed and United States Steel, which have invested millions in technology and exploration, may be forced either to channel their operations through foreign subsidiaries or drop out of deep-sea development altogether.

But industry executives defended the president's decision. They said it would certainly be impossible to obtain financing under the terms contemplated by the treaty, and that in any case circumstances could change in the decade before exploitation of the seabed actually begins. They also said other industrialized nations may refuse to ratify the treaty, making it possible for the United States to reach bilateral agreements with them and go ahead with seabed ventures regardless of the treaty.

The House Merchant Marine and Fisheries Committee has scheduled hearings beginning Tuesday on the reasons for the president's decision and its implications for

the mining and maritime industries. The House Foreign Affairs Committee is planning similar hearings in September.

Rep. Clement J. Zablocki (D-Wis.), chairman of the Foreign Affairs Committee, warned that "a major disappointment looms for the future of American industry in seabed mining."

The administration, Zablocki said, is hoping for a "mini-treaty" with mining states such as West Germany that would bypass the international control structure envisioned in the Law of the Sea Treaty. But Zablocki and many others predict that Japan and the major European nations will sign the sea treaty. "If the United States then tries to go it alone with seabed mining ventures, it will br risking serious consequences by violating the global treaty to which others adhere," Zablocki said.

Leigh Ratiner, a partner in the Washington law firm of Dickstein, Shapiro and Morin, who was deputy chairman of the U.S. delegation to the final sea law negotiating conference, says in the current issue of Foreign Affairs quarterly that "if the United States is not part of the treaty system, American companies will have to go to other countries to be able to conduct business in the seabed. As a result, the United States will lose direct access to strategic raw materials from the seabed, a goal it has sought consistently throughout the 10-year law of the sea negotiations."

The mining industry, Ratiner said in an interview, is "fantasizing" about European nations refusing to sign the treaty and joining the United States in separate arrangements. If metals prices rise and make investment feasible, he said, it is those nations that have both valid legal claims and guaranteed sites—acquired through adherence to the Law of the Sea program—that will be able to obtain financing.

John Temple Swing, vice president of the Council on Foreign Relations and a former member of the U.S. Law of the Sea delegation, said that "a great majority of nations, probably including all our allies, are likely to accept the law. I and many others believe that U.S. companies are therefore going to wind up being shut out of the deals they sought to preserve. They may have shot themselves in the foot."

He said he could imagine "gunboat scenarios" in which treaty signatories challenge U.S. mining vessels, but "more likely is the expropriation of assets when other nations think the U.S. is violating international law."

The treaty, which was overwhelmingly approved in a United Nations vote, would give control of the oceans' assets to an international authority and an "enterprise" that would approve mining ventures, issue licenses, validate claims, set production limits and distribute profits among signatory nations. According to treaty critics, that means those who invest capital and technological know-how in seabed mining won't reap the benefits of their input.

That is why American mining interests and the administration opposed it. The argument that the United States should work within the treaty framework, however, unpalatable, because American ventures cannot stand alone has not persuaded the potential seabed miners.

"I strongly supported the president's decision not to sign," said Conrad G. Welling, senior vice president of Ocean Minerals Co. (OMCO), an ocean mining consortium consisting of Lockheed, Standard Oil Co. of Indiana, Royal Dutch Shell and Royal Bos Kalis Westminster, a Dutch marine construction company.

He said opposition to the treaty "is the industry's position. The counter arguments show the total ignorance of the other side." He said it was clear that "we cannot raise the investment capital we need under the text as written. Those who want to sign the treaty argue that we are worse off without the treaty than with it, but if you have several courses open and some say maybe while one says no, you go with the maybe. . . . Nobody is going to finance any ventures under the terms of this treaty."

The elements found in deep-sea nodules are considered either strategic or industrially essential by the United States. There is only one mine in this country where nickel, essential for stainless steel, can be extracted economically. Cobalt, used in magnets and medical devices, is in critically short supply. Copper and manganese, used to make steel, are plentiful.

Western industrialized nations and Japan have already invested more than $400 million in exploration of the sea floor. In addition, the U.S.S.R., India and China have expressed interest. Four international consortia and an all-French company have developed technology to mine manganese nodules and extract metal from them. Ocean Minerals Co., for example, has experimented with a robot mining machine that crawls along the bottom scooping up the potato-size clusters and pumps them to an intermediate buffer, which in turn sends them through an 18-inch pipe to a mother ship on the surface. They are then pumped to a cargo ship for the trip to shore, where they are crushed and processed.

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The next step is to build full-scale prototypes and conduct pilot programs. With a $200 million price tag for each project, investors refuse to make commitments until the legal situation is settled and the economic situation is brighter.

Estimates by the Office of Ocean Minerals and Energy based on three exploration sites project 67 million dry tons of nodules can be raised from each 18,000-square-kilometer site. The nodules examined contain one percent or less of nickel, copper and cobalt, plus 29 percent manganese. At today's prices the four recoverable minerals are worth about $16 billion. There are perhaps 100 such mining sites in the world.

The current price of nickel is about $3 a pound; copper, 65 cents a pound, cobalt, $9 a pound; and manganese, $395 a ton. The agency's chief scientist, Rober Dill, estimates that a slight rise in market prices from their currently depressed levels would bring ocean mining to the break-even point. With nickel at $3.50 and copper at 90 cents, he said mining companies could recover three minerals at a cost of about $80 per ton, or four minerals for $130 a ton, and earn a 5 percent return on investment. A French consortium envisions annual revenues of $407 million for a company producing three minerals; $716 million for four minerals.

However, because ocean mining is such a risky venture, requiring a capital outlay of $1.5 billion to $1.8 billion per site, the industry is bound to demand a higher return on its investment before deep-sea mining becomes commercially viable.

"It's impossible for U.S. miners to make money under the treaty," said Jeffrey K. Amsbaugh, president of Ocean Mining Associates of Gloucester Point, Va., who speaks in terms of a return on investment of 20 percent or more as necessary to attract capital. Experts say a rise in the price of minerals that would make ocean mining viable depends on a host of factors, including supplies, the price of ore from land-based mines and, of course, political upheavals that could shut off sources of strategic minerals.

The best guess is that commercial mining of the ocean depths will not begin until the 1990s or perhaps the turn of the century. Given the existing legal and economic uncertainties, the industry has been on hold for the past two years. Only two of the consortia registered in this country maintain testing facilities and staff.

Whether they will continue to operate under their present structure is a subject of conjecture. A source close to the industry says that the U.S. companies are "scurrying to find ways to get under foreign flags." He added that there is already a movement abroad to form a pan-European consortium that could toss the U.S. companies out because it could not get mining sites from the United Nations if all the participants had not signed the treaty. American participants acknowledged the possibility of operating through foreign subsidiaries, but seemed more inclined to put faith in their government to work out an acceptable solution.

A 1980 law requires the United States to seek reciprocating agreements with other nations that have their own deep-sea mining operations, which is what those who oppose the treaty hope will now happen. Last week Otho Eskin, director of the State Department's Office of Ocean Law and Policy, said the effort to find reciprocal partners, who would recognize U.S. claims in exchange for U.S. recognition of theirs, would continue. But, he said, "it would be difficult to conclude such an agreement with any country that is a signatory to the treaty."

The U.S. legislation was intended to encourage American companies to undertake ocean exploration, but Eskin questioned whether "it does the industry any good. Can the industry, backed by that legislation, borrow a billion dollars? That is the question," he said.

"Can we carry out deep-seabed mining outside the treaty?" he asked. "It might very well be challenged in the International Court of Justice. We think we would have a good case there but you never can tell."

The administration, he said, will "look to creating conditions allowing companies to operate outside the treaty if they can get financing. We'll try to create as good a legal environment as possible." That could include federal loan guarantees or insurance to attract financing in the face of the risks.

[From the Washington Post, July 8, 1982]

United States To Refuse To Sign Pact on Law of the Sea

(By Don Oberdorfer)

The Reagan administration is preparing to announce a final decision not to sign the international treaty on Law of the Sea, rejecting pleas that the United States continue to bargain in hopes of making changes.

The decision, made by President Reagan after a National Security Council meeting on the subject June 29, risks eventual U.S. isolation from a new global system accepted by the rest of the world.

Four key allies, which had been pressing for word of Washington's intentions, were informed by the State Department last Friday that consultations scheduled with them Tuesday and yesterday had been postponed in light of a forthcoming announcement.

The allies were told, without specific details, that the announcement would be negative.

An administration source said the postponement was made because of concern that the consultations, coming at the same time or just before the administration's announcement, could have embarrassed Britain, France, West Germany and Japan by seeming to associate them with the U.S. decision.

One of this administration's first acts was to reverse the sea law policies of the Ford and Carter administrations, which had participated in bringing the talks to the edge of completion in difficult negotiations with Third World and industrial nations.

The Reagan administration blocked final action on the document early last year and, after nearly a year of study, decided in January to return to the bargaining table to pursue broad changes, especially in the economically important sections about mining the riches of the sea beds.

After a policy battle within the government, Reagan decided in April that the changes did not go far enough. Thus, on April 30, the United States was one of four nations to vote against the treaty, which was adopted by 130 countries, including France, Japan, most western nations and nearly all of the developing world.

Seventeen nations, including most of the Soviet bloc and a few industrialized western countries, abstained

In the latest round of controversy, several key allies and U.S. supporters of the treaty inside and outside government urged the administration to continue efforts for changes, in hopes that the document could be accepted by the administration.

A meeting scheduled for September in New York, according to treaty proponents, offers another opportunity for improvements if the United States were to stay in the bargaining.

By announcing now that the United States will not sign the treaty when the signing period begins late this year, the administration is averting a possibly more difficult decision later in case of new international concessions aimed at winning U.S. support.

"We think it is unrealistic to believe that [further negotiations] can make enough changes" to make it acceptable, an administration source said. "We see no possibility that the change would come close to meeting our overall objectives."

Reagan's decision, the source said bluntly, was to halt U.S. efforts and "get out now" rather than go deeper into the bargaining.

A "technical level" U.S. official is to be sent to a treaty-drafting conference starting Monday in Geneva, but this was described by administration sources as merely a defensive move to protect against changes in translations. The drafting conference is to make an official translation from English to eight other languages.

Reagan's decision was made against the advice of 85 house members, headed by Rep. Clement J. Zablocki (D-Wis.), chairman of the House Foreign Affairs Committee, and Rep. Benjamin A. Gilman (R-N.Y.).

The lawmakers, in a letter June 23, asked the president to continue full U.S. participation in remaining treaty conferences and to delay a final decision on signing the document until after a congressional review.

Writing in the current issue of Foreign Affairs magazine, Washington attorney Leigh S. Ratiner, deputy chairman of the U.S. delegation to last spring's final negotiating session, said it is likely that most major nations will join the sea law treaty even if the United States stays out.

Should this take place, he wrote, "We will suffer a significant, long-term foreign policy setback with grave implications for U.S. influence in global economic and political affairs."

Ratiner also charged that the costs of U.S. isolation could include serious economic disadvantages and a possible challenge to U.S. navigational rights through international straits.

A senior administration official dealing with the issue, however, said there is little or no prospect that the seabed mining provisions will become effective with the United States out. He said there is a substantial prospect of working out an alternate seabed mining system in cooperation with U.S. allies.

[From the Joint Maritime Congress, July 26, 1982]

Long Knives Out on Sea Law Stance

The post-mortem on the Administration's decision not to sign the Law of the Sea Treaty has begun. The House Committee on Merchant Marine and Fisheries held the first of two days of oversight hearings on the action and its ramifications on July 20th. In a packed hearing room rife with acrimony, recriminations, and confusion, the members tried to sort out what led President Reagan to announce on July 9th that the United States would not become a signatory and whether opposition forecasts of increased isolationism and concomitant dire effects on the nation's oceanic interests were true.

Assistant Secretary of State Theodore G. Kronmiller, pinch hitting for Ambassador James L. Malone, spelled out the Administration's objections to the Law of the Sea Treaty. These closely followed the observations that Ambassador Malone made in a press conference on July 9th. (See *Washington Letter*, July 19, 1982.) Assistant Secretary Kronmiller told the committee: "The attitude of many countries and groups was resistant to making changes that might have made it possible to meet our objectives. As a result, we are left with a Law of the Sea Treaty that, as President Reagan recently stated, fails to meet any of the U.S. objectives."

The Administration's stance came under heavy attack from both committee members and witnesses. Congressman Gerry E. Studds (D-MA) lashed out at the Administration's action, characterizing it as "an exercise in arrogance." The Congressman from Massachusetts warned that by refusing to sign the Law of the Sea Treaty the United States is isolating itself internationally and following a "path of ideological extremism."

Former Ambassador to the Law of the Sea Negotiations Elliot L. Richardson gave an articulate and often emotionally-charged defense of the Law of the Sea Treaty. He portrayed the current American posture as reflecting "a mixture of disappointed hopes and avoided realities" and predicted that if "we remain outside the Treaty, any American company that wishes to engage in deep-seabed mining will have no choice but to proceed under the flag of a member country." Ambassador Richardson based his remarks on a recent report by the General Accounting Office which disagrees with the Administration's position that the United States could still enter into a so-called "mini-treaty" affording access to deep-seabed mining by a Reciprocating States Agreement. He pointed to GAO surveys that concluded that United States allies will not join one and that American companies will not operate under domestic legislation: "The reason is clear. Domestic U.S. law cannot give anyone a secure legal right to exploit a defined area of seabed." Ambassador Richardson was visibly dismayed by the United States decision: "It would be sad if the United States, whose commitment to the rule of law contributed so much to laying the foundation of that achievement, were not to be party of it . . . There is still time for the realities to penetrate, and I am confident that they will eventually prevail."

Leigh S. Ratiner, formerly Deputy Chairman of the U.S. Delegation to the Law of the Sea Conference, joined Ambassador Richardson in warning that "direct national access to seabed minerals will be lost" and that every one of the President's six objectives set forth on January 29th "will be lost if the United States stays outside the treaty." Mr. Ratiner was equally suspicious that at some point in time, mining companies will return to the Merchant Marine and Fisheries Committee and request that the Deep-Seabed Hard Mineral Resources Act be changed to allow them to fly foreign flags. Mr. Ratiner stated in his testimony: "At the minimum, I would think that this committee would want to give thought to the usefulness of continuing to authorize appropriations under this Act since the Act may no longer be relevant to American mining companies—and may even impede development of the resources by American companies operating under foreign flags."

Under sharp questioning from committee members as to his support of the Treaty, Mr. Ratiner retorted: "What is your alternative solution? Show me an alternative."

[From the Sunday Times, July 25, 1982]

Reagan Tries To Waive the Rules on the Law of the Sea

(By Rosemary Righter)

Early this December the nations of the world, including Britain, will have to make an agonising decision. Whether to go ahead with one of the most imaginative,

far-reaching pieces of international legislation ever framed, knowing that it is implacably opposed by the richest and most powerful of them, the United States. Or to give President Reagan what he appears to want: a veto effectively nullifying some 15 years of careful, constructive, precisely-balanced work in the normally acrimonious corridors of global power.

The matter in question is the Law of the Sea, a set of rules and principles designed to cover virtually every aspect of political and commercial activity in, on and under the oceans. It will regulate sovereignty, transit rights, pollution, conservation, disputes, access to mineral resources, the complex problems raised by continental shelves and archipelagoes, and a thousand other items that crop up among the great waters.

Ironically, it was the U.S. which was largely responsible for initiating and nudging forward the endless negotiations. Four presidents gave their blessing and Henry Kissinger constructed the central bargain which balances the interests of rich and poor countries. In all but a tiny handful of its provisions, it is the U.S., as leading maritime nation, which would be the prime beneficiary. At the United Nations this spring, 130 countries came down in favour and only four against. Yet on a point of ideological purity, against the advice of many of his own advisers, officials and businessmen, President Reagan is prepared to consign the whole thing to the dustbin.

The sticking-point, for the free-market hardliners in the White House, concerns the minerals, mainly oil and mineral deposits, that lie on the sea-bed. The crucial concept of the Sea Law Convention is that oceanic resources should be managed as a "common heritage of mankind." But to extract the more valuable of these resources, huge quantities of capital and advanced technology will be required: assets that tend, at the moment, to be possessed only by the most developed powers, notably the U.S.

The convention devotes by far the largest part of its wordage to solving this conundrum. Declaring the sea-bed an international area, it sets out to establish an elaborate "parallel system" to explore and exploit it. Under the overall control of an International Sea-Bed Authority, it would freely license those private operators with the resolve and the cash—and the sums involved are in billions rather than millions of dollars—to chance their luck on the deep-ocean floor. But to ensure rational development, rather than a quick rip-off, it would retain powers to set "just and stable prices" and set limits to the rate of extraction. That is one point that profoundly irritates the Reagan team.

The other, in their eyes, is even worse. Each site designated as having commercial potential would be divided in two and the authority itself would develop the other half. The proceeds would then be distributed to all signatories to the convention "on a nondiscriminatory basis".

Many nations, including Britain, have reservations about this "global dividend" or "world tax system." But on the whole they feel the rest of the package is so valuable as to be well worth the price. Americans, including some of the sharpest earlier critics, now share this judgment. But Reagan does not agree. Most of the benefits will accrue to America anyway, he argues, just because it is the biggest boy on the block. Mining can go ahead without any treaty, or with a cosy agreement cooked up among those nations, like Japan, that currently possess the technology. So why sign?

Most bankers and lawyers profoundly disagree. No-one, they say, would touch such legally dubious operations with a barge-pole. The potential partners, sharing this view, see little attraction in Reagan's proposed "mini-treaty" and have every sort of reservation. So far they have been reluctant to utter their challenge in public, but now the time is running out. They have six months to pursuade the U.S. to change its mind. Otherwise, they must make it clear, the rest of the world will go ahead regardless. This is too important a baby to be thrown out with the ideological bathwater.

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Recommendations for U.S. Policy

A report of the Law of the Sea Committee
of the National Foreign Trade Council.

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I

INTRODUCTION

In February of this year, the National Foreign Trade Council issued its report, The Draft Convention on the Law of the Sea: Analysis and Appraisal. This report, comprehensive in scope, reviewed the draft convention resulting from the Tenth Session of the Third United Nations Conference on the Law of the Sea (A/Conf. 62/L.78, August 28, 1981), compared its provisions with objectives sought by the United States in the Conference and finally recommended improvements in the Convention to make it responsive to those objectives and needs of the U.S.

Although some improvement in the Convention occurred during the Eleventh Session of the Conference, March 8-April 30, 1982, the Convention that was adopted on April 30, 1982* over the opposition of the United States was not satisfactory. (The vote was 130 to 4, with 17 abstentions; in voting against the Convention the U.S. was joined by Israel, Turkey and Venezuela; Belgium, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Spain, Thailand and the United Kingdom abstained, as did the Soviet Union and the other members of the East European bloc with the exception of Romania.)

In general, the U.S. government has indicated its willingness to accept the Convention with the exception of the provisions for deep seabed mining nodules and the institutional arrangements for governing such mining in the area seaward of national jurisdiction. Indeed, the President's statement of July 9, 1982, stated that "(t)hose extensive parts dealing with navigation and overflight and most other provisions . . . are consistent with the United States interests . . ." He went on to say ". . . the deep seabed mining part of the Convention does not meet United States objectives." For that reason, he announced "that the United States will not sign the Convention as adopted by the Conference . . ."

The National Foreign Trade Council agrees that the United States should not sign the Convention in its present terms. The institutional arrangements to govern activities in the International Seabed Area ("The Area") are overly complex and will be too costly in view of the limited number of deep seabed mining ventures that are expected to be initiated in the foreseeable future. Moreover, the procedures for decision-making in the governing institutions fail to take adequate account of the level of investment and contributions of various States to deep ocean activities, particularly seabed mining.

*UN Document-Working Paper 1, June 4, 1982, prepared for the use of the Drafting Committee

The articles relating to deep seabed mining need further improvements that would assure access by qualified miners and that would remove disincentives to mining such as the requirements imposed on miners for transfer of their technology to others.

This report reviews principal problems with the Convention and suggests revisions which in the Council's view would contribute significantly toward making the Convention satisfactory.

The Council continues to believe that a satisfactory Law of the Sea Convention is the most effective way of providing a framework for the peaceful development of ocean uses and the resolution of any conflicts which may arise. We urge the Administration to continue efforts to secure a broadly based agreement on law of the sea matters which is responsive to the needs and objectives of the United States as well as those of other States.

II

DECISION-MAKING IN THE SEABED AUTHORITY

In view of the extensive powers provided to the Authority to govern deep ocean mining under the Convention, serious questions have arisen as to whether the United States should become party to a system where it might well be outvoted on issues of great significance to it. The United States and other developed countries suggested amendments to provide for weighted voting in the Council, the executive body of the Authority, which would have answered to some extent the problem of Council immobility which could result from the consensus requirement. These suggestions have included various combinations of Council members, dependent upon such criteria as the extent of investment in deep ocean mining, consumption of the types of metals occurring in deep ocean nodules, level of financial contribution to the United Nations and geographic region of party States, which acting jointly could move affirmative proposals though the Council with less than a consensus. It seems doubtful that at this stage of the Conference such concepts have real potential for acceptance.

In its earlier Analysis and Appraisal of the draft Convention, the National Foreign Trade Council (NFTC) urged that in view of the extensive powers accorded the Council, additional issues be made subject to the consensus voting rules and that Article 161 be amended in that respect.

Although the voting requirements regarding critical issues were improved in some respects at the 1982 session of the UN Conference, the NFTC repeats its earlier recommendation that consensus be required for Council decisions on two major issues - the budget of the Authority, which is submitted by the Council to the Assembly, and on decisions to disapprove certain areas of the Area for exploitation.

The budget of any institution is among the most important instruments for prudent management and control. Budgetary control is particularly necessary with a newly developing institution such as the Authority will be. Its budget should be subject to full agreement within the executive body of the Authority -- the Council.

Removal of areas from seabed exploitation if not supported by all Council members could become a divisive development within the Authority, placing in opposition States which wish to proceed with exploitation and those which favor delay. Thus full agreement through consensus voting should be the rule.

III

ASSURANCE OF STABLE CONTRACTURAL RIGHTS AND OBLIGATIONS

The Convention in Article 153 provides that "activities in the Area", that is, all exploration for and exploitation of the resources of the seabed and subsoil beyond the limits of national jurisdiction, are to be organized, carried out and controlled by the International Seabed Authority in accordance with the provisions of the Convention and the Authority's own rules and regulations. States and private companies sponsored by States may undertake such activities only in association with the Authority and in accordance with a formal plan of work in the form of a contract.

This plan of work must be approved by the Authority through its Council and will require the State or private party to abide by the Authority's rules and regulations. Annex III, which covers the basic conditions of prospecting, exploration and exploitation, provides in Article 21 that the law applicable to the contract shall be the provisions of Part XI of the Convention, the rules and regulations of the Authority, the terms and conditions of the contract and other rules of international law not incompatible with the Convention.

Adequate protection seems to have been provided against unilateral changes in the terms and conditions of the contract as such. Article 153 provides that a contract shall not be revised, suspended or terminated except in accordance with Annex III, Articles 18 (generally, for serious and willful failure to comply with the law applicable to the contract) and 19 (with the consent of the parties).

The Convention fails, however, to provide to the contractor any specific protection against a unilateral change by the Authority of its rules and regulations. The Authority's rules and regulations, and amendments to them, are adopted by consensus of the Council and by two-thirds vote of the Assembly. While the requirement for consensus in the Council would appear to ensure that some protection could be afforded by industrialized members of the Council against changes to the substantive elements of a contract through

such amendments, we believe it is insufficient to leave the protection of such essential contractual matters to the caprices and accommodations of the foreign affairs concerns of governments.

Further, although many disputes affecting the contract may be referred by a contractor to the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea, established under Articles 186-191, or to binding commercial arbitration, it is noteworthy that only a State (not a contractor) may submit to the Sea-Bed Disputes Chamber questions of acts of the Authority alleged to be in excess of jurisdiction or a misuse of power. The commercial arbitration tribunal may not interpret the Convention, and even the Sea-Bed Disputes Chamber may not pass upon exercise by the Authority of its discretionary powers or determine the "constitutionality" of the Authority's rules and regulations under the Convention.

To preserve the sanctity of the essential elements of the contractual bargain and to give real meaning to the security of tenure purported to be assured under Article 153(6) and Annex III, Article 16, the Convention should specify that the contract will incorporate and be governed by the rules and regulations of the Authority in effect at the effective date of the contract, and that amendments to such rules and regulations will be applicable only if and to the extent they do not alter any substantive right or obligation of the contractor, financial or otherwise, contained in the contract. Disputes concerning the effect of amendments to rules and regulations on the contractor's rights and obligations should be made the subject of binding commercial arbitration. It would be highly desirable if disputes concerning the alteration of an essential contract right or obligation by the Authority's excess of jurisdiction or misuse of power were likewise made subject to compulsory and binding arbitration.

IV

ASSURANCE OF PROPER CONSIDERATION OF PLANS OF WORK

The first essential element in the process of obtaining the right to explore for and exploit deep seabed resources is the submittal and approval of a plan of work. Preparation and submittal of the plan is in the hands of the would-be contractor. Review and approval rest with the Legal and Technical Commission and the Council of the Authority pursuant to Articles 153(3), 165(2)(b) and 162(2)(j).

The Commission is charged to review plans of work and to make recommendations to the Council based solely on the criteria stated in Annex III. The nature of the Commission's recommendation is very important in determining the voting procedure applicable to Council approval. Regrettably, there is no independent review mechanism to which an applicant itself may appeal an adverse recommendation by the Commission. Further, although the Council is required to act upon a plan of work within 60 days of its receipt from the Commission, no such time limit is placed on the Commission's action, and the applicant has no means of compelling such action.

Once at the Council, a plan recommended by the Commission may be disapproved only by consensus. However, a plan which the Commission recommends for disapproval, or upon which the Commission refrains from making a recommendation, may be approved only by three-fourths vote of the Council.

Annex III, Article 3, requires the Authority to approve a plan of work that is in conformity with the provisions of the Convention and the rules and regulations of the Authority. The applicant's sponsoring State may refer a dispute concerning the refusal of a contract to the Sea-Bed Disputes Chamber pursuant to Article 187(d). However, it is questionable whether the Sea-Bed Disputes Chamber can be considered a satisfactory forum in view of its probable composition; such a dispute is not included in the commercial arbitration provisions of Article 188(2).

In the view of the NFTC, it is important that the Commission be required to recommend either approval or disapproval of a plan of work within a specified period, say 90 days, after receipt of the plan, specifying in detail reasons for disapproval if such is the Commission's decision. Failure to act within the specified time should be deemed an action forwarding the plan to the Council recommending approval.

If a plan is recommended for disapproval, the applicant should have immediate access to binding commercial

arbitration to determine whether the applicant and the plan submitted meet all of the objective qualification criteria of Part XI and Annex III. If the arbitration tribunal determines that such criteria have been satisfied as a matter of fact, such finding itself should constitute a submission of the plan to the Council as though it were with a Commission recommendation for approval.

7.

V

TRANSFER OF TECHNOLOGY

In his remarks to Heads of Delegations at the Law of the Sea Conference on September 1, 1976, Secretary of State Henry Kissinger said that he had proposed to some members of Committee I that:

> "The United States would be prepared to agree to a means of financing the Enterprise...also that this would include agreed provisions for the transfer of technology so that the existing advantage of certain industrial States would be equalized over a period of time." (USUN Press Release 99 (76))

This proposal for "agreed provisions" has since been translated into a requirement that every contract for the conduct of activities in the Area shall contain an undertaking to make available to the Enterprise, and to developing nations in reserved areas, on fair and reasonable commercial terms and conditions, the technology used in carrying out such activities, and to obtain a written assurance from third-party owners of technology that such owners will make such technology available on fair and reasonable commercial terms and conditions. If such assurance is not obtained, the technology in question shall not be used by the operator in carrying out activities in the Area.

The President on January 29, 1982, stated that "the Convention should not contain provisions for the mandatory transfer of private technology". This is in accord with the view expressed by the NFTC in its Report of February, 1982, which concluded that:

> "The owners of proprietary technology should not be required to transfer such technology to others. All transfers should result from a free choice of the parties as regards terms and conditions..."

The reason for this is simply that technology is the

product of research and development, frequently developed at enormous cost and over long periods of time. In a going concern, it is utilized in private ownership as part of a competitive system. It is frequently the essence of an ability to compete. Without proprietary methods and systems, such ability could be rendered abortive. To compel a private company to make available the heart and intelligence of its own jealously guarded system would, in most instances, simply be to ask it to agree to its own self-destruction; for "commercial terms and conditions" would in most instances fall short of compensating a company for the loss of its competitive position.

The United States' objection to mandatory technology transfers, therefore, evidences a national decision to protect the private competitive system established in this country. This is welcomed by the NFTC. As a practical matter, deep ocean mining technology will be available to the Enterprise, when it is ready to organize the engineering and managerial capability to undertake mining. What will be needed is an expert engineering and managerial team competent to decide what systems to acquire or how to devise its own systems and then to learn, by trial and error in the harsh environments of the oceans, how to make it work on a profitable basis.

The arguments against mandatory technology transfers to the Enterprise apply with even greater force to the provisions of Article 5.3(e) requiring that "the same measures" be taken "for the benefit of a developing State or group of developing States which has applied for a contract" relating to areas reserved for the Enterprise for which the Enterprise has not itself requested technology or had technology transferred to it.

Various suggestions have been made for improving Article 5 of Annex 3, but many of these suggestions retain in some form the objectionable mandatory feature. In our view, the obligation should be limited to good faith cooperation with the Authority in assisting the Enterprise in the acquisition of technology which it requires. Such an obligation would not be objectionable so long as it does not contemplate coerced transfer of technology and is based on freedom of contract.

VI

PRODUCTION CONTROLS

Article 150 of the Convention establishes policies relating to activities in the Area. It commences as follows:

> "Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international co-operation for the over-all development of all countries, especially developing States, and with a view to ensuring:
>
> "(a) the development of the resources of the Area."

This "pro-production" policy was added in the final round of negotiations. However, it conflicts with the policy which continues to call for:

> "(f) the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand."

It is this latter policy of maintaining stable prices from other sources and of protecting land-based producers which is implemented in Article 151 whereby a nickel production ceiling is established, for a twenty-year period, to control the production of polymetallic nodules. Because of the production ceiling, an applicant must obtain a production authorization as well as an approved plan of work. The authorization will be based on the annual quantity of nickel to be recovered under the plan of work and will not be granted to the level of production applied for if the sum of that level and the levels already authorized exceed the nickel production ceiling. This ceiling is determined by a projection of trend line values for annual nickel consumption over various time periods related to applications for production authorizations and to commercial production. There is a floor of three percent for the annual rate of increase of nickel consumption. To the extent, and for so long as, the production ceiling does not permit the issuance of new production authorizations, applicants

which are fully qualified will be unable to commence mining operations.

Under Resolution II adopted in conjunction with the Convention, "pioneer investors" in polymetallic nodule mining whose plans of work are approved in the transition period before the Convention comes into force will enjoy priority over all other applicants in the allocation of production authorizations up to the level of the production ceiling, subject to the qualification that the Enterprise will enjoy absolute priority for production authorizations covering two mine sites. Resolution II provides for eight "pioneer investors" from developed countries and an indeterminate number from developing states. It is generally estimated that the ceiling would allow production authorizations for only four or five of these pioneer investors by the year 1995, increasing to seven or eight by the year 2000.

Of course, at this stage, these estimates are uncertain due to variations in nodule density in possible areas, variations in rates of production that might be achieved with as yet untested equipment, and the uncertain recoveries of metals from various nodule deposits. Nevertheless, it is clear that the priority which pioneer investors will enjoy does not necessarily mean that all of them will be able to commence mining operations when the Convention comes into force or for some years thereafter (or even wish to since they will be subject to all the Authority's rules and regulations). Unless they agree to an order of priority or an apportionment of production among themselves, an as yet unspecified body will decide the order in which production authorizations will be granted, taking into account not only technical, financial and investment considerations, but as well the need to enhance opportunities for all States Parties, irrespective of social and economic systems or geographical locations. Further, the combination of Resolution II and production controls are likely to effectively bar any new entrants into ocean mining other than those able to meet the January 1, 1985 deadline in Resolution II for developing country prioneer investors.

The Convention now provides that rules and regulations governing minerals other than polymetallic nodules are subject to consensus voting in the Council. This gives the United States a veto over unacceptable production controls for such other minerals. Of course each one of the other 35 Council members also will have a veto. Accordingly, there will be a tendency to agree upon production ceilings for other minerals in order to avoid a stalemate in the development of rules and regulations to govern such other minerals.

In sum, the production ceiling for polymetallic nodules renders ineffective the "pro-production" policy now stated in the Convention and tends to create a precedent for production ceilings governing other minerals despite the consensus voting requirement in the Council.

In the view of the NFTC, production controls should be opposed. Such controls distort supply and price to the detriment of consumers and producers and when imposed globally by an international organization would politicize the development of those minerals subject to the controls.

VII

MARINE SCIENTIFIC RESEARCH

All nations have a strong interest in freedom of scientific research in the oceans. It benefits not only present generations, but looks to benefit future generations which will be increasingly dependent on ocean resources. The NFTC would prefer a marine scientific research regime which provides greater freedom to the researcher in the Exclusive Economic Zone and on the continental shelf. In the area seaward of national jurisdiction--namely, the Area--such research must be free.

Paragraph C of Article 240 which provides that "marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with the Convention" should be coupled with a right of the individual researcher to compulsory arbitration to determine whether an unjustifiable interference would occur in a particular case.

THE REVIEW CONFERENCE AND AMENDMENTS TO PART XI

The NFTC's Report of February 1982 recommended that changes be made in Article 155 of the draft Convention relating to amendment of Part XI and relevant Annexes, the provisions governing mining of the deep seabed. Article 155 provided that a Review Conference would be convened 15 years after the year in which commercial production commenced from the deep seabed for the purpose of considering whether changes in Part XI and these Annexes were appropriate. If the Conference failed to reach agreement on amendments after five years of deliberation, amendments could be adopted by a two-thirds vote of the conferees and would enter into force when these had been ratified, acceded to, or accepted by two-thirds of the States Parties to the Convention. Such entry into force would be binding upon all States Parties irrespective of whether a particular State approved the amendments.

The Review Conference would have been able, under the draft Convention, to establish its own rules of procedure.

The NFTC urged that changes be made in Article 155 so that the Review Conference would have to continue from year to year until amendments had been approved by consensus, or until a decision by consensus had been reached to terminate the Conference.

During the negotiations at the Eleventh Session of the Law of the Sea Conference in March and April 1982, revisions were made in Article 155. With these revisions, the decision-making procedure of the Review Conference is similar to that applicable to the Law of the Sea Conference itself. Thus, the Review Conference should make every effort to reach agreement by consensus on any proposed amendments. The revisions also make it clear that there should be no voting until all efforts at consensus have been exhausted. In addition, the two-thirds majority required for adoption of amendments by the Review Conference and for ratification or accession thereof by States Parties necessary to bring amendments into force, was increased to three-fourths.*

The changes relating to the Review Conference and relevant Annexes move only part of the way towards accommodating the recommendations of the NFTC for acceptance of amendments by consensus and the somewhat similar demands of President Reagan that amendments of deep seabed provisions should not come into force for a State participating in the treaty without its approval.

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* Although the text of the Convention as distributed by the U.S. Delegation still states that "two-thirds" applies to ratification, accession, or acceptance by States Parties, Mr. James Malone, Chairman of the U.S. Delegation to the Law of the Sea Conference, has confirmed that "three-fourths" is the correct fraction and that "two-thirds" is a typographical error.

One possible solution to the problem of approval of amendments might be the insertion in the Law of the Sea Convention of a "tacit acceptance" provision of the type found in a number of international conventions relating to maritime matters,* or some acceptable variation thereof. The essence of tacit amendment provisions in a treaty is to permit an organization or body created under it or otherwise concerned with its administration to recommend amendments; to prescribe the number of acceptances needed to bring the proposed amendments into force; and further to provide that such amendments are deemed binding only on States Parties to the convention which accept them, or which do not, within a given period to indicate that they reject them, with silence being deemed acceptance. Although tacit acceptance provisions are generally accompanied by provisions which require something less than acceptance by all the States Parties to a treaty for amendments to be effective, there is no reason why universal acceptance (including tacit acceptance) could not be required.

Tacit acceptance is generally only one of the features of the amendment procedures of the aforementioned conventions, and it is by no means a "cure-all." However, it might help solve the amendment problem, perhaps if it were coupled with other provisions such as the continuation of Paragraph 5 of Article 155, which provides that amendments shall not affect existing mining contracts, and possibly even some of the provisions suggested in U.N. document A/Conf. 62/L.104 (a group of amendments sponsored by some 11 smaller industrial countries) which would permit a State Party which did not accept amendments to continue to enjoy rights and to perform obligations under the other provisions of the Convention.

Consideration should also be given to amendment of Part II and relevant Annexes upon ratification, accession, or acceptance of amendments by a given number (or given proportion) of States Parties, with a proviso that those in favor must include a predetermined number of States Parties which have the greatest investment in seabed mining, e.g., those States Parties sponsoring the four largest investments. This procedure would be based on the analogy of the "coming-into-force" provisions in some maritime treaties which require that among the ratifying States there be included a given number of States having a specified amount of tonnage registered under their flags.

*The U.S. is a party to some of these.

IX

CONCLUSION

The National Foreign Trade Council reiterates its view that a satisfactory Law of the Sea Convention, widely accepted by States and covering all ocean uses, would be in the genuine interests of the United States and all States. Unfortunately, the Convention which emerged on April 30, 1982 from the Third United Nations Conference on Law of the Sea is unsatisfactory and should not be signed unless improved.

Improvements in the following areas are essential if the Convention is to meet the basic requirements of the U.S. and thus justify its signature:

1. Decision-making in the Seabed Authority, particularly the Council;

2. Limitations on the production of polymetallic nodules from the international seabed Area;

3. Coerced transfer of technology;

4. Unsatisfactory procedures for approval of applications by qualified miners to exploit seabed resources;

5. Security of agreed terms and obligations of contracts to mine;

6. Review Conference procedure for amending Part XI and relevant Annexes;

7. Increased protection for the marine scientific researcher in the Area.

Under the rules of the Conference, the U.S. can sign the Final Act of the Conference even though it does not sign the Convention. The NFTC understands that the U.S. plans to sign the Final Act. Such signing would permit the U.S. to participate as an observer, without a vote, in the Preparatory Commission which will develop the rules and regulations for deep ocean mining. It would be desirable for the U.S. to attend the Preparatory Commission in such status and there to use its influence to assure insofar as possible that those rules and regulations are constructive and responsive to U.S. objectives.

The United States should continue its efforts in any forum that offers promise to secure a broadly based agreement on the law of the sea meeting legitimate U.S. requirements. Whatever means are employed to eventually obtain this objective, it is important that it be understood by all States that the U.S. is genuinely interested in being party to a satisfactory Law of the Sea Convention.

A POSTSCRIPT ON ANTARCTICA

The February NFTC Report suggested that a provision be added to the draft Convention stating that it has no applicability to Antarctica in order to avoid any possibility that the International Sea-Bed Authority might sometime attempt to assert jurisdiction over Antarctica or its continental margin. The Convention approved at the Eleventh Session of the Law of the Sea Conference still makes no reference to Antarctica.

The NFTC believes this is a matter of some significance and that appropriate action should be taken by the United States and other nations concerned with Antarctica. For example, appropriate "Interpretive Statements" should be made by various States which are parties to the Artarctic Treaty at the final session of the Law of the Sea Conference or contemporaneously therewith. Such action would go at least part of the way towards assuring that the Convention does not provide a basis for unintended jurisdiction over Antarctica and its continental margin.